



AMICUS CURIAE BRIEF PRESENTED TO THE INTER-AMERICAN
COMMISSION ON HUMAN RIGHTS BY THE REDRESS TRUST
(REDRESS)

IN THE CASE OF
KHALED EL-MASRI v. UNITED STATES
SUBMITTED TO THE COMMISSION IN APRIL 2008

MARCH 2009

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INTRODUCTION

1. These written comments are respectfully submitted to the Inter-American Commission on Human Rights (the “Inter-American Commission”) in support of the petition made by Mr. Khaled El-Masri against the United States of America (“US”) on 9 April 2008.
2. The Redress Trust (“REDRESS”) is an international human rights non-governmental organization based in the United Kingdom with a mandate to assist torture survivors to prevent their further torture and to seek justice and other forms of reparation. It has accumulated a wide expertise on the rights of victims of torture to gain both access to the courts and redress for their suffering, and has advocated on behalf of victims from all regions of the world. Since its establishment, REDRESS has regularly taken up cases on behalf of torture survivors at the national and international level, and provides assistance to representatives of torture survivors. REDRESS has extensive experience in interventions before national and international courts and tribunals, including the United Nations’ Committee against Torture and Human Rights Committee, the European Court of Human Rights, the International Criminal Court, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.
3. This case concerns the ‘extraordinary rendition’ of the petitioner, Mr. Khaled El-Masri, a German citizen, from Macedonia to Afghanistan, where he alleges he was arbitrarily detained, tortured and ill-treated from 23 January to 29 May 2004. The petitioner has attempted to bring a civil claim for compensation in the courts of the United States of America (US), the state allegedly responsible for his ‘extraordinary rendition’. His claim has been dismissed on the basis of the ‘state secrets’ privilege which precludes the judiciary from hearing evidence which would be harmful to national security if disclosed. In the case of the petitioner, the US executive argued, and US courts to date have agreed, that the central issue of the case – namely, the alleged ‘extraordinary rendition’ of the petitioner – was itself a ‘state secret’ and therefore the case as a whole could not proceed.
4. REDRESS’ submission of written comments to the Inter-American Commission prior to a decision on admissibility is motivated by the urgency of this case, both in terms of the petitioner’s immediate situation and the fact that his case is representative of a wider practice and persisting impunity for ‘extraordinary rendition’ which continues to severely impact upon the rights and well-being of a number of potential plaintiffs.
5. This submission advances and develops the following points:
 - a) The consideration of the petition by the Inter-American Commission is urgent for two reasons:

- (i) First, the petitioner in this case has been denied access to the US courts on the grounds of the ‘state secrets’ privilege. In common with many torture survivors who are denied access to justice, the combination of the ‘extraordinary rendition’ he suffered and the lack of opportunity to bring a claim for redress in the US has had a severe and detrimental impact on the petitioner’s psychological wellbeing and his ability to reintegrate into society. The timely hearing of this case by the Inter-American Commission could therefore have a positive impact on the petitioner and, given the urgency of the case, reflects the only possible recourse available to the Inter-American Commission since precautionary measures would be inappropriate on the facts of the case.

- (ii) Second, the allegations of ‘extraordinary rendition’ in the petitioner’s case are not isolated; rather this case reflects a broader practice of ‘extraordinary rendition’ by the US as part of its post-September 11, 2001 counter-terrorism strategy. With the recent change in administration, the new US President has committed to closing the detention facility at Guantánamo Bay and other known and secret detention sites operated by the Central Intelligence Agency (the “CIA”), and to ending the use of interrogation techniques that constitute torture or other forms of prohibited ill-treatment. While such steps indicate a positive change in US policy, the administration is yet to explicitly acknowledge the illegality of the practice of ‘extraordinary rendition’ or denounce its use. As such, a timely analysis of the legality of the practice of ‘extraordinary rendition’ by the Inter-American Commission may act as a catalyst to prompt the US administration to address this issue.

Furthermore, the number of individuals potentially affected by the practice of ‘extraordinary rendition’ ranges between hundreds and thousands. As the petitioner was prevented from bringing a civil claim for compensation in the US courts on the basis that ‘extraordinary rendition’ constitutes a ‘state secret’, it logically follows that all other cases in which ‘extraordinary rendition’ is alleged, would also be rejected by US courts as non-justiciable. Indeed, in all other cases to date in which victims of ‘extraordinary rendition’ have tried to bring cases in US courts, their claims have similarly been dismissed on national security grounds.

With the closure of Guantánamo Bay and the other CIA-operated detention facilities, the number of claims presented in US courts could potentially rise significantly. While the actions taken by the new US President are welcome developments, they do not reach far enough in terms of ensuring that victims of ‘extraordinary

rendition' have access to an effective remedy and full and adequate reparation. In this respect, a timely decision by the Inter-American Commission as to the compatibility of the 'state secrets' privilege with the right to a remedy in cases of 'extraordinary rendition' would provide an authoritative interpretation of the US' international obligations, particularly under the American Convention on Human Rights 1978 (the "American Convention") and American Declaration on the Rights and Duties of Man 1948 (the "American Declaration"), to both the US executive and judiciary in assessing the admissibility of claims currently on appeal and of future claims for compensation brought by victims of 'extraordinary rendition'.

- b) The Inter-American Commission applies the American Declaration when considering cases against states which, like the US, are not parties to the American Convention.¹ However, the US has signed the American Convention,² which therefore remains relevant to an interpretation of its human rights obligations.³ It is submitted that the practice of 'extraordinary rendition' is particularly egregious as it entails multiple serious violations of the American Declaration⁴ and American Convention;⁵ and violates fundamental non-derogable principles that are enshrined within the Inter-American system and internationally, most notably the right to liberty and security of the person, the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the absolute principle of *non-refoulement*, and the prohibition against enforced disappearance.
- c) The application of the 'state secrets' privilege by the US courts in the petitioner's case violates the right to a remedy enshrined in Articles 1, 8 and 25 of the American Convention and Articles II, XVII, XVIII, XXIV and XXVI of the American Declaration, and which is well-established in the jurisprudence of the Inter-American Commission and Inter-American Court of

¹ See Article 49 of the Rules of Procedure of the Inter-American Commission on Human Rights stating that: "[t]he Commission shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man in relation to the Member States of the Organization that are not parties to the American Convention on Human Rights".

² The US signed the American Convention on Human Rights (entry into force 18 Jul.1978) (the "American Convention") on 1 June 1977 but has not yet ratified it.

³ Article 18(a) of the Vienna Convention on the Law of Treaties 1969 (entry into force on 27 Jan. 1980) provides that: "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty".

⁴ Including, Article I (Right to life, liberty and personal security), Article II (Right to equality before law), Article V (Right to protection of honor, personal reputation, and private and family life), Article XVII (Right to recognition of juridical personality and civil rights), Article XVIII (Right to a fair trial), Article XXIV (Right of petition), Article XXV (Right of protection from arbitrary arrest) and Article XXVI (Right to due process of law).

⁵ Including, Article 3 (Right to Juridical Personality), Article 5 (Right to Humane Treatment), Article 7 (Right to Personal Liberty), Article 8 (Right to a Fair Trial), Article 10 (Right to Compensation), Article 11 (Right to Privacy), Article 24 (Right to Equal Protection) and Article 25 (Right to Judicial Protection).

Human Rights (the “Inter-American Court”), and in international law more broadly. While the protection of national security interests may reflect a legitimate aim, the application of the ‘state secrets’ privilege cannot extinguish the right to a remedy completely but must only constrain the right in a proportionate and least restrictive manner. In the petitioner’s case, the US courts failed to consider ways in which they could accommodate national security concerns while affording the individual a remedy, but rather applied the ‘state secrets’ privilege as a blanket bar to litigation.

- d) The Inter-American Commission’s consideration of the merits of this case is therefore urgent as a result of the immediate situation of the petitioner and because the case represents a broader practice of ‘extraordinary rendition’ by the US for which impunity persists.

A. THIS PETITION SHOULD BE DECIDED UPON AS A MATTER OF URGENCY BY THE INTER-AMERICAN COMMISSION

6. As set out above, it is respectfully submitted that the Inter-American Commission should decide upon this petition as a matter of urgency, given the detrimental impact of the ‘extraordinary rendition’ and the denial of access to justice on the petitioner; and the authoritative role a decision on the merits, assessing both the legality of the practice of ‘extraordinary rendition’ and the compatibility of the ‘state secrets’ privilege with the right to a remedy, could have on US policy and practice, and in pending and future cases in which ‘extraordinary rendition’ is alleged in the US courts.

1) The Present Petition is Urgent on the Particular Facts of the Petitioner’s Case

7. In the present case, the petitioner alleges that he was apprehended in Macedonia by agents of the Macedonian government and held by them in a hotel for 23 days. During his detention, Mr. El-Masri was harshly interrogated, refused contact with his family and consulate, and denied access to a lawyer. He was then handed over to CIA agents who, he alleges, stripped and beat him, dressed him in a diaper, blindfolded him, placed earmuffs on him and hooded him, before tying him to the floor of an aircraft, drugging him and flying him to Afghanistan. On arrival, Mr. El-Masri was held arbitrarily and incommunicado for four months in the notorious ‘Salt Pit’ Prison.⁶ Throughout his arbitrary detention, Mr. El-Masri was subjected to torture and other cruel, inhuman and degrading treatment (“other ill-

⁶ D. Priest, “CIA Avoids Scrutiny of Detainee Treatment” *Washington Post* (3 Mar. 2005) (noting that “[t]he Salt Pit was the top-secret name for an abandoned brick factory, a warehouse just north of the Kabul business district that the CIA began using shortly after the United States invaded Afghanistan in October 2001. The 10-acre facility included a three-story building, eventually used by the U.S. military to train the Afghan counterterrorism force, and several smaller buildings, which were off-limits to all but the CIA and a handful of Afghan guards and cooks who ran the prison, said several current and former military and intelligence officers.”) available at: <http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html>

treatment”), including force-feeding, before being blindfolded, flown to Albania and left on a hilltop in the middle of the night.⁷

8. In 2005, the petitioner initiated a civil claim for compensation in the US District Court for the Eastern District of Virginia against the former Director of Central Intelligence, George Tenet, three private aviation companies, ten unnamed employees of the CIA and ten unnamed employees of the defendant corporations. Shortly after the case was filed, the US executive intervened to seek dismissal of the case, claiming that further litigation would be harmful to national security. The case was then dismissed by the District Court, and the Court of Appeals for the Fourth Circuit upheld that decision.⁸ In October 2007, the Supreme Court refused to review the ruling of the Fourth Circuit Court of Appeals.⁹
9. The ‘state secrets’ privilege is a common law evidentiary rule. In applying the rule, the judiciary is tasked with determining whether the disclosure of evidence, over which the executive has asserted the privilege, would be harmful to national security.
10. Successful invocation of the ‘state secrets’ privilege results in the removal of the evidence over which the privilege is asserted from the proceedings. In certain cases, lower courts have identified situations in which the evidence over which the privilege is invoked is so integral to the determination of the case that the judiciary may decline to hear the case at all.¹⁰ For example, in the present case, the Fourth Circuit Court of Appeals held that:

[t]he effect of a successful interposition of the state secrets privilege by the United States will vary from case to case. If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue. But if “the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the proper remedy”.¹¹

11. In the petitioner’s case, the Court of Appeals determined that Mr. El-Masri’s access to the court should be completely denied because:

... the facts central to its resolution would be the roles, if any, that the defendants played in the events he alleges. To establish a prima facie

⁷ “Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits” submitted by the American Civil Liberties Union Petition to the Honorable Members of the Inter-American Commission on Human Rights, Organization of American States, (9 Apr. 2008) at 5 – 15.

⁸ *El-Masri v. Tenet*, Docket No. 06-1667, 479 F. 3d. 296, US Court of Appeals Fourth Circuit, (2 Mar, 2007).

⁹ See Order List 552 US (9 Oct. 2007): Cert. denied in 06-1613 *El-Masri, Khaled v. United States*.

¹⁰ See, W. G. Weaver and R. M. Pallitto, “State Secrets and Executive Power,” 120(1) *Political Science Quarterly*, 85 (2005) at 92; R. M. Chesney, “State Secrets and the Limits of National Security Litigation” 75 *Geo. Wash. L. Rev.* 1249 (2006-2007) at 1261

¹¹ *El Masri v. Tenet*, supra note 8 at para. 26.

case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations.¹²

12. Thus, according to the reasoning of the US courts, the ‘state secrets’ privilege can act as an absolute bar to litigation by extinguishing the right to an effective remedy entirely. Since the Supreme Court denied certiorari in the petitioner’s case,¹³ Mr. El-Masri is left without a remedy in the US, the state allegedly responsible for his ‘extraordinary rendition’.

a) *The Denial of Access to Justice has had a Severe and Detrimental Impact on the Petitioner*

13. In certain cases, access to justice in and of itself can have a beneficial impact on the victim’s healing process. In contrast, a denial of access to justice can compound existing trauma. This is precisely what has happened in the case of the petitioner.
14. Since the petitioner returned to Germany, he has faced significant difficulties in reintegrating into society. In May 2007, the petitioner set fire to a supermarket, an act which his German lawyer was reported in the media as attributing to the deep psychological impact of the ‘extraordinary rendition’ on Mr. El-Masri and the lack of rehabilitation provided to him on return. Immediately following this criminal act, the petitioner was admitted to a psychiatric hospital.¹⁴ The petitioner has reportedly suffered a nervous breakdown and is in a constant state of paranoia that he or his children will be shot or kidnapped.
15. The petitioner has only recently started to receive psychological and rehabilitative treatment in Germany, therefore the preparation of a full psychological report has not yet been possible as the treatment he is receiving is in its early stages and the focus is currently on establishing a relationship of trust between therapist and client.
16. However, the affidavit attached to this submission by Dr. Katherine Porterfield, a senior psychologist at the Bellevue/NYU Program for Survivors of Torture,

¹² *El Masri v. Tenet*, supra note 8 at para. 36.

¹³ See Cert. denied in *El-Masri, Khaled v. United States*, supra note 9.

¹⁴ “Attorney for German in CIA kidnapping case concedes client set fire to store”, *International Herald Tribune* (18 May 2007) available at: <http://www.ihf.com/articles/ap/2007/05/18/europe/EU-GEN-Germany-CIA-Kidnapping-Claim.php> ; T. Paterson, “Rendition victim sent to mental institution after arson attack” *The Independent (UK)* (19 May 2007) available at: <http://www.independent.co.uk/news/world/europe/rendition-victim-sent-to-mental-institution-after-arson-attack-449478.html> . See also, “Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits”, supra note 7 at 18.

demonstrates the detrimental impact the denial of access to justice has had on Mr. El-Masri.

17. In particular, Dr. Porterfield highlights the difficulties faced by Mr. El-Masri in reintegrating into his community as a result of the lack of an official acknowledgment of what happened to him.¹⁵ She concludes that:

[g]iven my extensive conversations with Mr. El-Masri, I believe his current mental state is being directly and adversely affected by the lack of any official action against those who harmed him or even an official statement about the crimes committed against him. It is my strong clinical opinion that some recognition and validation of the truth of his claims and of the injustice and criminality of what was done to him would be profoundly helpful to his mental and emotional well-being.¹⁶

18. The case of the petitioner has been considered extensively in a report prepared by the Council of Europe. This report describes the petitioner's attempts to access justice and to receive acknowledgment, and the challenges he has faced in this respect. The report concurs with Dr. Porterfield's opinion in linking the petitioner's mental and emotional state with his inability to obtain justice and official acknowledgement. It notes that:

[a]gainst this background, Mr El-Masri himself is still suffering severely from the psychological consequences of the ordeal he has gone through. He has been repeatedly victimised by personal attacks in the local media and has been unable to find employment in the last three years. ... According to his current therapist, the conflict between his post-traumatic care and the pressure arising from the various ongoing procedures to establish the truth simply adds to Mr El-Masri's problems.

It is therefore all the more regrettable that Mr El-Masri has not yet been given an official apology for the abuses he has suffered, despite the fact that Mr Schily has stated before the *Untersuchungsausschuss* that Mr El-Masri is innocent and that the Americans have long since offered their own apology to the German Government.¹⁷

19. As such, on the facts of this particular case, access to justice is an urgent priority in order to provide the petitioner with the opportunity to overcome the effects of the 'extraordinary rendition', to rehabilitate and to reintegrate into society.

b) The Detrimental Impact of Denial of Justice on the Petitioner is Consistent with Academic and Clinical Studies of the Experiences of Torture Survivors

¹⁵ Statement regarding Mr. Khaled El-Masri, Declaration of Dr. Katherine Porterfield (5 Jan. 2009) at page 3.

¹⁶ *Id.* at 4.

¹⁷ Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report" (11 Jun. 2007), Doc. 11302 rev., at paras. 296 – 297.

20. A number of academic and clinical studies support the conclusion that the exercise of the right to a remedy can have beneficial effects for certain survivors of torture and enforced disappearance; whereas, a denial of access to justice can compound the existing trauma.
21. In relation to “ordinary” crime, Shapland suggests that pursuing civil litigation can allow the victim to regain a sense of control through the court action, thus illustrating that he or she is no longer an outsider, and that this can assist the individual in moving from being a victim to a survivor.¹⁸
22. Lind *et al.* conclude that the dignity accorded to the individual during the legal process, the opportunity to make his or her case to a neutral and independent decision-maker, and the degree of control the person has over the process are important determinants in the satisfaction experienced by the individual in his or her encounter with the law.¹⁹
23. The Medical Foundation for the Care of Victims of Torture, a UK-based organization dedicated solely to the treatment of torture survivors, has stated that:

[t]he availability of accessible mechanisms itself can be experienced as acknowledgment and commitment by the State to uphold the right to reparation ... Compensation can provide victims of torture public acknowledgment of their survival, facilitating the reestablishment of their dignity, self-esteem, trust in others and belief in the world as just ... A public and official recognition of harm done and the condemnation of perpetrators contribute to a sense that events are unmasked, the truth is told and a legacy of the past is acknowledged and remembered.²⁰
24. Mary Robertson, a Chartered Clinical Psychologist at the London-based Traumatic Stress Clinic, has stated that “the process of truth recovery and successful vindication has many elements similar to a therapeutic process” and “[h]aving the truth recognised and properly acknowledged through some form of redress, can play an integral role in the survivor’s journey to recovery”.²¹
25. Testimonies of victims who have had access to a court in which to argue their case support the conclusion that access to a court can have a rehabilitative effect. For example, a torture survivor from El Salvador stated that, “[b]eing a part of the case and having the opportunity to confront these generals with these terrible facts

¹⁸ J. Shapland, “Victims, the Criminal Justice System and Compensation” 24(2) *British Journal of Criminology* 131 – 149 (1984).

¹⁹ E.A. Lind, R.J. MacCoun *et al.*, “In the Eye of the Beholder: Tort Litigants’ Evaluations of their Experiences in the Civil Justice System,” 24(4) *Law and Society Review* 953 – 996 (1990) at 971 – 973.

²⁰ REDRESS “Torture (Damages) Bill 2007-08: A Private Member’s Bill to Provide a Remedy for Torture Survivors in the United Kingdom: Compilation of Evidence Received following the Call for Evidence launched by Lord Archer of Sandwell QC” (Jul. 2008) at 25.

²¹ Expert Report of Mary Robertson, Chartered Clinical Psychologist, Traumatic Stress Clinic in REDRESS *id.* at 52.

provided me with the best possible therapy a torture survivor could have”.²² Another victim who was tortured together with his wife in Honduras commented on the effect of bringing a civil suit in the US as “[a]t least there’s recognition of a jury that they were responsible for the torture of those people”.²³ One of the reasons given by another torture survivor tortured in El Salvador for bringing a lawsuit in the US courts was that he was “looking for a psychological healing of the wounds that torture left on me. I need an explanation and that is why I need a day in court”.²⁴

26. While the healing and recovery process for survivors of torture and enforced disappearance is complex, lengthy and ongoing, and particular to the individual victim, the inability to bring a claim for compensation or to obtain an acknowledgment by an independent and neutral court of law of the crimes that took place can often complicate and even impede an individual’s recovery process.
27. Although the process of bringing a case against the alleged perpetrators can prove traumatic for some victims,²⁵ in those cases in which torture survivors find it important to take their case to court but are denied access to the court because of the operation of a procedural rule such as the ‘state secrets’ privilege, the inability to litigate their case can compound their existing suffering and result in a situation, such as the petitioner’s, whereby they are unable to move forward with their lives, to receive treatment for what they have experienced or to recover.
28. Edelman *et. al.* have found that a situation of impunity, where no sanctions are taken against the perpetrators, can have serious negative consequences for the individual survivor. They argue that impunity functions as a secondary injury which can cause additional trauma.²⁶
29. Gurr and Quiroga similarly contend that “impunity interrupts the normal process of healing of the survivor of repression, the grief of the families of disappeared victims, and the process of social reparation. Impunity prolongs the psychopathological consequence of repression, both in the individual and society”.²⁷

²² Testimony of Dr. Juan Romagoza Arce (Executive Director, La Clinica Del Pueblo and Plaintiff, Romagoza Arce v. Garcia), before the Subcommittee on Human Rights and the Law, Committee on the Judiciary, US Senate, “*No Safe Haven: Accountability for Human Rights Violators in the United States*”, (14 Nov. 2007) at page 4 available at: http://www.cja.org/projects/policy/romagoza_senate_testimony_nov07.pdf

²³ W. Branigin, Washington Post Staff Writer, “Confronting the Past: 6 Honduran Plaintiffs Suing Over 1980’s Human Rights Abuses” (25 Jul. 2002) available at: http://www.cja.org/cases/Grijalba_News/Grijalba_WA_Post7-25.htm

²⁴ Statement of Mr. Carlos Mauricio, available at: <http://www.cja.org/forSurvivors/CarlosforSurvivors.shtml>

²⁵ Y. Danieli, “Preliminary Reflections from a Psychological Perspective” in N. J. Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Vol I: General Considerations* (United States Institute of Peace, Washington DC.) (1995).

²⁶ L. Edelman, D. Kordon, D. Lagos, “La Impunidad: Reactivación del Trauma Psíquico” 24 *Reflexión* (Dec. 1995) 24 – 26.

²⁷ R. Gurr and J. Quiroga, “Approaches to Torture Rehabilitation: A Desk Study Covering Effects, Cost-Effectiveness, Participation and Sustainability” in 11 *Torture* (2001) 3 – 35 at 27.

30. The Inter-American Court has itself recognized the impact of denial of justice on victims of violations of the American Convention. For example, in *Las Palmeras v. Colombia*, the Court found that, “[t]he damage caused by this situation [of impunity] consists of the impossibility of punishing those truly responsible, which creates a feeling of defenselessness and anguish among the next of kin of the victims”.²⁸

31. In this respect, a timely decision on the merits by the Inter-American Commission could have a significant beneficial effect on the petitioner’s recovery.

c) An Expedited Decision on the Merits is the Only Recourse Available to the Inter-American Commission, given the Unavailability of Precautionary Measures in this Case

32. In serious and urgent cases, the Inter-American Commission may issue ‘precautionary measures’ when necessary in order to prevent irreparable harm to persons.²⁹ Similarly, the Inter-American Court may issue ‘provisional measures’ in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons.³⁰ In the *Matter of the Indigenous Community of Kankuamo*, the Inter-American Court set out the rationale for provisional measures as:

[i]n International Human Rights Law, provisional measures are not only precautionary in the sense that they preserve a legal situation, but fundamentally protective because they protect human rights, inasmuch as they seek to avoid irreparable damage to persons. Provisional measures may be applied whenever the basic requirements of extreme gravity and urgency are met, together with the need to prevent irreparable damage to persons. In this way, provisional measures are transformed into a true jurisdictional guarantee of preventative character.³¹

33. In his separate opinion in the *Matter of Mendoza Prisons*, Judge Diego Garcia Sayán emphasized the importance of practicality in the issuance of provisional measures:

[i]f provisional measures ordered for this type of situations are not understood in a restricted perspective and dimension, one could be running the risk of trying to understand —through such measures— a comprehensive issue that could only be successfully solved by way of a process with mid- and long-term goals, and as a result of the interaction

²⁸ *Las Palmeras v. Colombia*, Inter-Am. Ct. H.R., (Ser. C) No. 96 (26 Nov. 2002) at para. 53(a). See also, *Juan Humberto Sánchez v. Honduras*, Inter-Am. Ct. H.R., (Ser. C) No. 99 (7 Jun. 2003) at para. 176.

²⁹ See Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights.

³⁰ See Article 26 of the Rules of Procedure of the Inter-American Court of Human Rights and Article 63(2) of the American Convention.

³¹ *Provisional Measures with Regard to the Republic of Colombia: Matter of the Indigenous Community of Kankuamo*, (Order of the Inter-Am. Ct. H.R., 30 Jan. 2007) at para. 5 of the Court’s considerations.

of a set of decisions and policies dealing with administrative, judicial, legislative and budgetary aspects. Therefore, the “extreme gravity” and “urgency” have to refer to issues that can be subjected to an order of the Court so as to obtain immediate and tangible results that can be overseen by the Court.³²

34. Judge Sayán further explained that the purpose of ‘avoiding irreparable damage’ usually relates to:

the nature and context of the rights under threat. It is evident that irreparability should logically follow a threat —of extreme gravity and urgent nature— to rights such as the right to life and physical integrity. Certainly, it might be urgent to fight off threats “of extreme gravity” to other types of rights. On a per-case basis, possible resulting damage should be analysed in order to assess the irreparability to which the term “irreparable” —as used in the language of Article 63(2)— refers, as not just any threatened or affected right necessary creates such situation.³³

35. In the practice of the Inter-American Court and Commission, provisional or precautionary measures are issued in order to preserve the rights of the parties to a case and have therefore been granted in situations in which the applicant is at risk of a violation of the American Convention; continues to be exposed to treatment contrary to the American Convention; or is in serious ill-health and requires medical treatment in order to preserve his or her physical integrity.³⁴

36. The Inter-American Commission has already recognized the serious and urgent nature of cases like the petitioner’s in its extension of precautionary measures to the situation at Guantánamo Bay.³⁵ Most recently, on 20 August 2008, the Inter-American Commission issued precautionary measures to protect Djamel Ameziane, an Algerian citizen who has been held at Guantánamo Bay for more than six years. It requested the US to:

1. Immediately take all measures necessary to ensure that Mr. Djamel Ameziane is not subjected to cruel, inhuman or degrading treatment or

³² *Provisional Measures in the Matter of Mendoza Prisons (Argentina)*, (Order of the Int-Am. Ct. H.R. 30 Mar. 2006), Concurring Opinion of Judge Diego García-Sayán at para. 9.

³³ *Id.* at para. 14.

³⁴ See, for example, *Francisco Pastor Chaviano Gonzalez v. Cuba*, Precautionary measures Nº 19-07, Int-Am. Comm. H.R. (28 Feb. 2007) (precautionary measures granted to guarantee life and physical integrity and to instruct competent authorities to evaluation health conditions and to provide adequate medical treatment in detention centre in which petitioner had a serious illness); *Felix Andres Mendoza Monterroso and Family v. Guatemala*, Int-Am. Comm. H.R. (23 Mar. 2007) (precautionary measures granted to guarantee life and physical integrity and to report on actions taken to investigate judicially the facts that gave rise to the precautionary measures which were torture, threats, kidnapping and death threats to family members because of the complaints lodged); *Trade Unionists at the Empresa Portuaria Quetzal v. Guatemala*, Int-Am. Comm. H.R. (31 Aug. 2007) (precautionary measures to guarantee life and physical integrity; and to report on actions take to investigate judicially the facts that gave rise to the precautionary measures - granted after petitioners subject to intimidation and threats and secretary general of trade union killed and witness to the killing also murdered). (See Annual Report of the Int-Am. Comm. H.R. 2007, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (29 Dec. 2007)).

³⁵ “Precautionary Measures in Guantanamo Bay, Cuba”, Int-Am. Comm. H.R. (12 March 2002) (see Annual Report of the Int-Am. Comm. H.R. 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1 (7 Mar. 2003)).

torture during the course of interrogations or at any other time, including but not limited to all corporal punishment and punishment that may be prejudicial to Mr. Ameziane's physical or mental health;

2. Immediately take all measures necessary to ensure that Mr. Djamel Ameziane receives prompt and effective medical attention for physical and psychological ailments and that such medical attention is not made contingent upon any condition;

3. Take all measures necessary to ensure that, prior to any potential transfer or release, Mr. Djamel Ameziane is provided an adequate, individualized examination of his circumstances through a fair and transparent process before a competent, independent and impartial decision maker; and

4. Take all measures necessary to ensure that Mr. Djamel Ameziane is not transferred or removed to a country where there are substantial grounds for believing that he would be in danger of being subjected to torture or other mistreatment, and that diplomatic assurances are not used to circumvent the United States' non-refoulement obligations.³⁶

37. However, in the present case, since the petitioner is no longer detained, is not subject to threats or intimidation, and his physical integrity is not in danger, precautionary measures would be inappropriate as they would not bring any practical benefit, as emphasized by Judge Sayán, to his situation.
38. However, until the petitioner has the opportunity to have his case heard by a neutral arbiter, he remains at risk of irreparable harm to his psychological integrity as a result of the 'extraordinary rendition' itself and the subsequent denial of his right to a remedy.
39. In the absence of appropriate precautionary measures, therefore, the only course of action available to the Inter-American Commission to address the risk of irreparable harm to the petitioner is to expedite the consideration of the case by requesting a prompt reply from the respondent state, joining the hearing on admissibility and on the merits, and expediting a hearing on the case.

2) An Analysis of the Legality of 'Extraordinary Rendition' and of the Compatibility of the 'State Secrets' Privilege with the Right to an Effective Remedy could Authoritatively Impact on Decisions of the US Executive and Judiciary, and on the Provision of a Remedy to the Hundreds and Potentially Thousands of Individuals Affected by 'Extraordinary Rendition'

³⁶ Letter to Center for Constitutional Rights and Centro por la Justicia y el Derecho Internacional (CEJIL) from the Inter-American Commission on Human Rights, Ref: Djamel Ameziane, Precautionary Measures No. 211-08, United States (20 Aug. 2008) available at: <http://ccrjustice.org/files/2008-08-20%20ACHR%20Initial%20Response.pdf>

40. The petition before the Inter-American Commission alleges the ‘extraordinary rendition’ of the petitioner.³⁷ ‘Extraordinary rendition’ has been defined as “[t]he extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman or degrading treatment”.³⁸ It has also been referred to as ‘torture by proxy’ or ‘outsourcing torture’.³⁹
41. The allegations of ‘extraordinary rendition’ in the petitioner’s case are not isolated but rather reflect a broader practice by the US as part of a post-September 11, 2001 rendition program, potentially affecting between hundreds and thousands of individuals. With the measures adopted by the newly-appointed US President on the closure of Guantánamo Bay and CIA-operated detention facilities; on prohibiting interrogation techniques that amount to torture or other ill-treatment; and on the establishment of processes to review interrogation and transfer policies and how to address the situation of detainees held in Guantánamo Bay, it would appear that there has been a shift in the US’ counter-terrorism policy. However, it remains to be confirmed whether the practice of ‘extraordinary rendition’ will be terminated. Even if the practice itself is terminated, individuals who allege that they were subject to ‘extraordinary rendition’ continue to be denied access to US courts in order to assert their right to an effective remedy and full and adequate reparation as a result of the operation of the ‘state secrets’ privilege. As such, a decision analyzing the legality of ‘extraordinary rendition’ and the compatibility of the ‘state secrets’ privilege with the right to an effective remedy is urgently needed.

³⁷ See, “Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits”, supra note 7 at Part A, 5 – 18.

³⁸ United Kingdom Intelligence & Security Committee, “Special Report into Rendition” (July 2007) Chairman The Rt. Hon. Paul Murphy MP, at para. 7 (the Report continues at para. 8 to note that, “For example, the transfer of battlefield detainees from Afghanistan to Guantánamo Bay would fall into the category of “Military Renditions”. The transfer of a detainee unconnected to the conflict in Afghanistan to Guantánamo Bay would be a “Rendition to Detention”. A transfer to a secret facility constitutes cruel and inhuman treatment because there is no access to legal or other representation and, on that basis, we would describe this as an “Extraordinary Rendition”). See also M. L. Satterthwaite, “Rendered Meaningless: Extraordinary Rendition and the Rule of Law” 75 *Geo. Wash. L. Rev.* 1333 (2006-2007) at 1336.

³⁹ A. Brown (International Affairs & Defence), “Extraordinary Rendition” House of Commons Library, Standard Note: SN/IA/3816 (23 Mar. 2006) at 3. For examples of ‘extraordinary renditions’ see, *Alzery v. Sweden*, UN Human Rights Committee, UN. Doc. CCPR/C/88/D/1416/2005 (10 Nov. 2006) at para. 3.11; Council of Europe Parliamentary Assembly, “Secret detentions and illegal inter-state transfers of detainees involving Council of Europe member states: second report”, supra note 17 at paras. 180-200 (The anatomy of CIA secret transfers and detentions in Poland) and 219-231 (The anatomy of CIA secret transfers and detentions in Romania); Human Rights Watch, “United States: Ghost Prisoner: Two Years in Secret CIA Detention” (Feb. 2007) at 24 (detailing the transfer of Marwan Jabour from Afghanistan to Jordan: “[t]hey put cotton over his eyes, cotton in his ears, and rubber over that. Then they put a band around his head, a mask over his face, and head phones over his ears. His hands were cuffed in front and his legs were shackled. A belt was put around his legs, above the knees, and his handcuffs were attached to it”); Human Rights Watch, “Double Jeopardy: CIA Renditions to Jordan” (Apr. 2008) at 22 – 25 (reporting that Ramzi bin al-Shibh was rendered from Afghanistan to Jordan by the U.S. and put “in a diaper and wrapped [with] a giant bandage around his body” and describing the rendition of Ali Al-Hajj Al-Sharquawi from Amman to Kabul by taking him “to the airport in a black hood that came down to his shirt. When [he] arrived at the airport, they cut his clothes off, searched his anus and gave him diapers, shorts, and a sleeveless shirt and plastic handcuffs. He stood in the room for an hour in handcuffs tied to the walls. They took pictures of him. Then they came for him, tied his feet together and tied his hands together.”)

a) The Nature of the US' Post-September 11, 2001 Rendition Program Involved a Risk of Torture and Other Ill-Treatment Prior and During the Flight and on Arrival at the Detention Site

42. The US executive has acknowledged and defended its use of a post September 11, 2001 program of rendition. The US recognizes the extra-judicial nature of its rendition program but maintains that it complies with international law. While it denies that torture and other ill-treatment form part of the program, independent investigations by parliamentary bodies and non-governmental organizations, and the testimony of individuals, such as the petitioner, who allege that they have been subject to 'extraordinary rendition', suggest that victims of 'extraordinary rendition' have been subjected to and/or are at risk of torture and other ill-treatment in preparation, during or after the 'extraordinary rendition' process. Moreover, the US' definition of torture is narrower than that provided by international law. As such, acts carried out as part of the US' rendition program, which the US does not consider to constitute torture or other ill-treatment, such as its 'enhanced interrogation techniques', may well constitute torture or other ill-treatment under international law.
43. Former US President, George W. Bush, and former Secretary of State, Condoleezza Rice, have on various occasions publicly acknowledged the use of a renditions program and of secret detention sites, and have defended their use as vital tools in the fight against terrorism. For example, in September 2006, former US President, George W. Bush, stated :

[w]orking with our allies, we've captured and detained thousands of terrorists and enemy fighters in Afghanistan, in Iraq, and other fronts of this war on terror. ...

In some cases, we determine that individuals we have captured pose a significant threat, or may have intelligence that we and our allies need to have to prevent new attacks. ... In these cases, it has been necessary to move these individuals to an environment where they can be held secretly [sic], questioned by experts, and -- when appropriate -- prosecuted for terrorist acts.

Some of these individuals are taken to the United States Naval Base at Guantanamo Bay, Cuba.

In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency.⁴⁰

⁴⁰ "Press Release: President Discusses Creation of Military Commissions to Try Suspected Terrorists" (6 Sept. 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> . See also "Remarks of Secretary of State Condoleezza Rice Upon her Departure for Europe at Andrews Air Force Base" (5 Dec. 2005), available at <http://www.america.gov/st/washfile-english/2005/December/20051205124753frllehctim0.2305872.html>

44. President Bush further confirmed that the US would continue to operate such a program:

[t]his program has been, and remains, one of the most vital tools in our war against the terrorists. It is invaluable to America and to our allies. ...

...We will continue to bring the world's most dangerous terrorists to justice -- and we will continue working to collect the vital intelligence we need to protect our country. The current transfers mean that there are now no terrorists in the CIA program. But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical -- and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information.⁴¹

45. As such, it is clear that the US, at least under the previous administration, engaged in the practice of rendition and that the subjects of this program were, and/or continue to be, held arbitrarily in detention sites such as Guantánamo Bay and at other secret sites.

46. While the US has rendered individuals for decades, the nature of its rendition program changed significantly following the events of September 11, 2001 and is now regarded as amounting to 'extraordinary rendition'. This has been recognized by the United Kingdom's (the "UK") Foreign and Commonwealth Office:

[r]endition has been used as a law enforcement and judicial tool in the US for many decades. Many commentators have used the term extraordinary rendition to mean the extra-judicial transfer of persons from one jurisdiction to another specifically for the purposes of detention and interrogation outside the normal legal system, giving rise to an increased risk of torture or cruel, inhuman or degrading treatment. It is this practice that has given rise to concern and public debate in recent years.⁴²

47. US officials have stated that the US' rendition, detention and interrogation program complies with US law and with the US' treaty obligations, and does not violate the absolute prohibition of torture and other ill-treatment. For example, former US President, George W. Bush, has maintained that:

⁴¹ *Id.*

⁴² United Kingdom Foreign & Commonwealth Office, "Human Rights Annual Report" (2007) at 15. *See also* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Report of the Events Relating to Maher Arar" Factual Background Volume II (2006) at 524 (noting that "[i]t appears that the American practice of rendition changed significantly in the aftermath of 9/11 ... the majority of renditions carried out since then have not been "renditions to justice." Instead, they have involved the transfer of individuals to other countries for one of two purposes: intelligence gathering through coercive interrogation, or warehousing of individuals considered to constitute a threat to U.S. national security"); D. Priest, *supra* note 6; Intelligence & Security Committee Special Report *supra* note 38 at para. 65 and 70 (commenting that "...the U.S. rendition programme had now extended its boundaries beyond individuals connected to the conflict in Afghanistan. ...this demonstrated conclusively that the U.S. was willing to exercise these powers on individuals unconnected to the conflict in Afghanistan".)

...the CIA used an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used But I can say the procedures were tough, and they were safe, and lawful, and necessary. ...

...

I want to be absolutely clear with our people, and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it -- and I will not authorize it.⁴³

48. Similarly, former Secretary of State, Condoleezza Rice, has stated that:

[i]n conducting such renditions, it is the policy of the United States, and I presume of any other democracies who use this procedure, to comply with its laws and comply with its treaty obligations, including those under the Convention Against Torture. Torture is a term that is defined by law. We rely on our law to govern our operations. The United States does not permit, tolerate, or condone torture under any circumstances. Moreover, in accordance with the policy of this administration:

-- The United States has respected -- and will continue to respect -- the sovereignty of other countries.

-- The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture.

-- The United States does not use the airspace or the airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured.

-- The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.

...

As CIA Director [Porter] Goss recently stated, our intelligence agencies have handled the gathering of intelligence from a very small number of extremely dangerous detainees...It is the policy of the United States that this questioning is to be conducted within U.S. law and treaty obligations, without using torture. It is also U.S. policy that authorized interrogation will be consistent with U.S. obligations under the Convention Against Torture, which prohibit cruel, inhuman, or degrading treatment.⁴⁴

49. However, the US' definition of torture and other ill-treatment does not comply with the definition under international law. Therefore, acts carried out in its

⁴³"Press Release: President Discusses Creation of Military Commissions to Try Suspected Terrorists", *supra* note 40.

⁴⁴C. Rice *supra* note 40.

rendition program which it may not define as torture or other ill-treatment may fall within the definition under international law and thus constitute a violation of the US' international obligations.

50. For example, in a 2003 memorandum, the former US Deputy Assistant Attorney General John C. Yoo stated in summary on Sections 2340-2340A of title 18 of the United States Code, which criminalize torture committed outside the US, that:

[s]ection 2340's definition of torture must be read as a sum of these component parts. ...Each component of the definition emphasizes that torture is not the mere infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. ... In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term's common meaning. Torture is generally understood to involve "intense pain" or "excruciating pain" or put another way, "extreme anguish of body or mind." ...In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts [underline added].⁴⁵

51. Moreover, the US has acknowledged the use of 'enhanced interrogation techniques' against some of the individuals rendered. For example, in February 2008, General Mike Hayden, Director of the CIA stated,

[i]n the life of the CIA detention program we have held fewer than a hundred people. And only -- actually, fewer than a third of those people have had any techniques used against them -- enhanced techniques -- in the CIA program. America's Army literally today is holding over 20,000 detainees in Iraq alone...

...
Let me make it very clear and to state so officially in front of this committee that waterboarding has been used on only three detainees. It was used on Khalid Sheikh Mohammed, it was used on Abu Zubaydah, and it was used on Nashiri. The CIA has not used waterboarding for almost five years. We used it against these three high value detainees because of the circumstances of the time.⁴⁶

⁴⁵ J. C. Yoo, Deputy Assistant Attorney General, "Memorandum for William J. Haynes II, General Counsel of the Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States" (14 Mar. 2003) at 44-45.

⁴⁶ General M. Hayden (Director of the Central Intelligence Agency), "Hearing of the Senate Select Committee on Intelligence, Annual Worldwide Threat Assessment" (5 Feb. 2008) at 23-24.

52. Such definitions have been heavily criticized for failing to comply with the US' international obligations.⁴⁷ For example, the UN Committee against Torture has underscored its concern that:

in 2002 the State party authorized the use of certain interrogation techniques that have resulted in the death of some detainees during interrogation. The Committee also regrets that "confusing interrogation rules" and techniques defined in vague and general terms, such as "stress positions", have led to serious abuses of detainees (articles 11, 1, 2 and 16).

The State party should rescind any interrogation technique, including methods involving sexual humiliation, "waterboarding", "short shackling" and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.⁴⁸

53. Moreover, the New York Times reported that a leaked classified CIA report acknowledged that the techniques employed in the interrogation of individuals suspected of involvement in terrorism may not comply with the US' international legal obligations:

[a] classified report issued last year by the Central Intelligence Agency's inspector general warned that interrogation procedures approved by the C.I.A. after the Sept. 11 attacks might violate some provisions of the international Convention Against Torture, current and former intelligence officials say.

...

The report, by John L. Helgerson, the C.I.A.'s inspector general, did not conclude that the techniques constituted torture, which is also prohibited under American law, the officials said. But Mr. Helgerson did find, the

⁴⁷ See, e.g., Human Rights Watch "The Road to Abu Ghraib" (Jun. 2004) at 9 (commenting that a 2002 US Justice Department memo, "also took an extremely narrow view of which acts might constitute torture".) See also, "Pentagon memo approved use of harsh interrogation against terror suspects", *The Guardian*, (2 Apr. 2008) (commenting that "Jameel Jaffer, director of the ACLU's national security project, said Yoo's legal reasoning puts "literally no limit at all to the kinds of interrogation methods that the president can authorize". "The whole point of the memo is obviously to nullify every possible legal restraint on the president's wartime authority," Jaffer said. "The memo was meant to allow torture, and that's exactly what it did.""). The article also quotes Senate Judiciary Committee Chairman Patrick Leahy as saying the memo, "reflects the expansive view of executive power that has been the hallmark of this administration" and "[t]his memo seeks to find ways to avoid legal restrictions and accountability on torture and threatens our country's status as a beacon of human rights around the world"). Available at: <http://www.guardian.co.uk/world/2008/apr/02/usa1>

⁴⁸ UN Committee against Torture, Conclusions and Recommendations: United States of America, U.N. Doc. No. CAT/C/USA/CO/2 (25 Jul. 2006) at para. 24. Justice Collins of the High Court of England and Wales has similarly stated that: "[u]nfortunately, it appears that the United States has a somewhat different view as to what constitutes torture in this country and to what is applied by Strasbourg under the European Convention on Human Rights, and I suspect to what is applied by the international body in relation to the Convention Against Torture" (Mr Justice Collins, *Rawi & Anor, R (on the application of) v Secretary of State for Foreign and Commonwealth Affairs & Anor*, [2006] EWHC 458 (Admin) (16 Feb. 2006) at para. 4). See also, B. Ross and R. Esposito, "CIA's Harsh Interrogation Techniques Described" *ABC News* (18 Nov. 2005) (detailing deaths of detainees following "harsh interrogation") available at: <http://abcnews.go.com/WNT/Investigation/story?id=1322866>

officials said, that the techniques appeared to constitute cruel, inhuman and degrading treatment under the convention.⁴⁹

54. Further, although the US denies that it uses torture or other ill-treatment as part of the rendition process, the UN,⁵⁰ regional bodies such as the Council of Europe⁵¹ and European Parliament,⁵² NGOs⁵³ and investigative journalists⁵⁴ have found that torture and other ill-treatment have been used in preparation for and/or during some of the documented renditions and/or on or after arrival at detention sites.

55. For example, the Council of Europe Parliamentary Assembly has stated that:

⁴⁹ D. Jehl, "Report Warned C.I.A. on Tactics In Interrogation" *New York Times* (9 Nov. 2005) available at: <http://www.nytimes.com/2005/11/09/politics/09detain.html>

⁵⁰ See, for example, Committee against Torture, "Concluding Observations: United States of America" *supra* note 48; and Human Rights Committee, "Concluding Observations: United States of America", U.N. Doc. No. CCPR/C/USA/CO/3/Rev.1 (18 Dec. 2006). See also, Human Rights Council, "Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council": Report of the Working Group on Arbitrary Detention", Chairperson-Rapporteur: Leïla Zerrougui, U.N. Doc. A/HRC/4/40 (9 Jan. 2007)

⁵¹ E.g., Council of Europe Parliamentary Assembly, "Secret detentions and illegal inter-state transfers of detainees involving Council of Europe member states: second report", *supra* note 17. See also, Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Rapporteur Mr. Dick Marty, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states" Doc. 10957 (12 Jun. 2006); Council of Europe, "Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies" SG/Inf (2006) 5 (28 Feb. 2006); and Council of Europe, "Secretary General's supplementary report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies" SG/Inf (2006) 13 (14 Jun. 2006).

⁵² European Parliament, Rapporteur Giovanni Claudio Fava, "Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners", Doc. A6-0020/2007, (30 Jan. 2007).

⁵³ See for example, Amnesty International, "USA: Law and Executive Disorder- President Gives Green Light to Secret to Secret Detention Program" AI Index: AMR 51/135/2007 (17 Aug. 2007); Amnesty International, "Europe: Partners in Crime: Europe's Role in US Renditions" AI Index: EUR 01/008/2006 (13 Jun. 2006); Amnesty International, "USA: Below the Radar: Secret Flights to Torture and 'Disappearance'" AI Index: AMR 51/051/2006 (4 Apr. 2006); Amnesty International, "'Rendition' and Secret Detention: A Global System of Human Rights Violations. Questions and Answers" AI Index: POL 30/003/2006 (1 Jan. 2006); Human Rights Watch, "Double Jeopardy" *supra* note 39; Human Rights Watch, "Black Hole: The Fate of Islamists Rendered to Egypt" (9 May 2005); Human Rights First, "Backgrounder on Extraordinary Renditions and Other Extra-Judicial Transfers" (n/d); Human Rights First, "Still Missing: Gaps in the U.S. State Department Human Rights Reports on Secret Detentions and Renditions" (n/d); Reprieve, "Mass Rendition, Incommunicado Detention and Possible Torture of Foreign Nationals in Kenya, Somalia and Ethiopia" (22 Mar. 2007); and Amnesty International, Cageprisoners, the Center for Constitutional Rights, the Center for Human Rights and Global Justice at NYU School of Law, Human Rights Watch and Reprieve, "USA: Off the Record: US Responsibility for Enforced Disappearances in the 'War on Terror'" AI Index: AMR 51/093/2007 (7 Jun. 2007). See also, ; Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice New York University School of Law, "Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"" (2004).

⁵⁴ See for example, D. Priest, *supra* note 6; J. Mayer, "Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program" *The New Yorker* (14 February 2005) available at: http://www.newyorker.com/archive/2005/02/14/050214fa_fact6 ; B. Herbert, "It's Called Torture" *New York Times* (28 Feb. 2005) available at: <http://www.nytimes.com/2005/02/28/opinion/28herbert.html> ; D. Knight, "Outsourcing a Real Nasty Job: Shipping terrorism suspects overseas for some tough questioning may make sense. But is it legal?" *US News and World Report* (15 May 2005) available at: <http://www.usnews.com/usnews/news/articles/050523/23rend.htm> ; "Self-Inflicted Wounds" *International Herald Tribune* (17 Feb. 2005) available at: <http://www.iht.com/articles/2005/02/16/opinion/ed torture.php> . See also, R. W. Stevenson, "President Makes It Clear: Phrase is 'War on Terror'" *New York Times* (4 Aug. 2005) available at <http://www.nytimes.com/2005/08/04/politics/04bush.html>

“[e]xtraordinary rendition” and secret detention facilitate the use of degrading treatment and torture. It is even the stated objective of such practices...

...
[d]rawing on all this concordant information and evidence we can say that there is a great deal of coherent, convergent evidence pointing to the existence of a system of "relocation" or "outsourcing" of torture.⁵⁵

b) With the Recent Change in Administration an Important Process of Review of the Core Elements of Extraordinary Rendition has Started. Although this Suggests the Practice Could be Abandoned, No Explicit Recognition of Its Illegality or Commitment to Termination has been Made

56. With the recent change in the US administration, there are encouraging signs of a significant shift in the US' overall counter-terrorism policies and practice, in particular in relation to the detention sites, treatment of detainees and interrogation methods. For example, only two days after his inauguration as US President, President Barack Obama signed three Executive Orders relating to the US' counter-terrorism strategy.
57. The executive orders commit to the closure of detention facilities at Guantánamo Bay⁵⁶ and those operated by the CIA,⁵⁷ and specify that interrogation techniques should only comprise those “authorized and listed in Army Field Manual 2 22.3”.⁵⁸ While these orders address certain components of the ‘extraordinary rendition’ process, none explicitly acknowledges the illegality of ‘extraordinary rendition’ or denounces its practice. Rather, they establish a process of review of the treatment of detainees, interrogation and transfer policies. As such, a timely decision by the Inter-American Commission which addresses the legality of ‘extraordinary rendition’ could authoritatively impact upon such a review process.
58. The Executive Order entitled ‘Review of Detention Policy Options’ establishes a Special Interagency Task Force on Detained Disposition, which is in charge of conducting “a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options

⁵⁵ Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, “Alleged secret detentions in Council of Europe member states, Information Memorandum II”, Doc. AS/Jur (2006) 03 rev, (22 Jan. 2006) at para. 69 and 85. See also Council of Europe Parliamentary Assembly, “Secret detentions and illegal inter-state transfers of detainees involving Council of Europe member states: second report”, supra note 17 at para 9 (noting that “[w]e believe we have shown that the CIA committed a whole series of illegal acts in Europe by abducting individuals, detaining them in secret locations and subjecting them to interrogation techniques tantamount to torture”).

⁵⁶ Executive Order “Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities” (22 Jan. 2009) available at: http://www.whitehouse.gov/briefing_room/executive_orders/

⁵⁷ Executive Order “Ensuring Lawful Interrogations” (22 Jan. 2009) available at: http://www.whitehouse.gov/briefing_room/executive_orders/

⁵⁸ *Id.*, at Section 3(b).

as are consistent with the national security and foreign policy interests of the United States and the interests of justice” [underline added].⁵⁹

59. In the second order entitled ‘Ensuring Lawful Interrogations’, a Special Interagency Task Force on Interrogation and Transfer Policies was created and assigned the following tasks:

(i) to study and evaluate whether the interrogation practices and techniques in Army Field Manual 2 22.3, when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies; and

(ii) to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations for the United States to ensure the humane treatment of individuals in its custody or control [underline added].⁶⁰

60. Third, in the Executive Order entitled ‘Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities’, President Obama stated that:

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. ...

...

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109-366, as well as of the military commission process more generally [underline added].⁶¹

61. In the same Order, the President determined furthermore that “[a] review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately” and that the “[t]he Review shall determine, on a rolling

⁵⁹ Executive Order “Review of Detention Policy Options” (22 Jan. 2009) at section 1(e) available at: http://www.whitehouse.gov/briefing_room/executive_orders/

⁶⁰ Executive Order “Ensuring Lawful Interrogations”, *supra* note 57, at Section 5(e).

⁶¹ Executive Order “Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities”, *supra* note 56, at Section 2(d) and (g).

basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release”.⁶²

62. Even though these Executive Orders have been praised as important steps away from the post-September 11, 2001 counter-terrorism strategy of the Bush Administration,⁶³ human rights organizations, journalists and other individuals have voiced their concern about the unknown outcome of these review processes, in particular as to whether the practice of ‘extraordinary rendition’ will be terminated. For example, the journalist, Rob Winder, noted that:

...the orders appear to leave loopholes that could allow some controversial US practices to continue.

Extraordinary renditions, where “terror” suspects are apprehended and transferred from countries by US intelligence services or their allies, without going through any legal process, could still be carried out.

A senior Obama administration official has said the policy of extraordinary rendition would continue while a task force headed by the US attorney general investigates the issue [underline added].⁶⁴

63. In relation to the practice of torture, the US-based Centre for Constitutional Rights, while recognizing in a press release that President Obama’s orders “are an important first step in restoring the rule of law”, also states that “[a]gain, we caution that the order may leave an escape hatch if the CIA should want more tactics, i.e. torture, available in its arsenal”.⁶⁵

⁶² *Id.*, at sections 4(a) and 4(2).

⁶³ See, for example, S. Shane, M. Mazzetti and H. Cooper, “Obama Reverses Key Bush Security Policies” *The New York Times* (22 Jan. 2009) available at: <http://www.nytimes.com/2009/01/23/us/politics/23obama.html> ; S. Goldenberg, “Guantanamo closure marks pivotal turn in US fight against terrorism” *The Guardian* (22 Jan. 2009) available at: <http://www.guardian.co.uk/world/2009/jan/22/guantanamo-obama-closure> ; Czech Presidency of the European Union, “EU Presidency Statement on the decision to close the Guantanamo detention camp” (11 Feb.. 2009) available at: <http://www.eu2009.cz/en/news-and-documents/cfsp-statements/eu-presidency-statement-on-the-decision-to-close-the-guantanamo-detention-camp-7119/> ; and United Nations Department of Public Information, “Secretary-General welcomes United States decision to start process for closing Guantanamo Bay detention facility” (23 Jan. 2009).

⁶⁴ R. Winder, “Questions remain over US renditions” *Aljazeera.net* (24 Jan. 2009) available at: <http://english.aljazeera.net/news/americas/2009/01/200912322203169224.html> . See also T. Baldwin, “Barack Obama grants CIA permission to retain right to carry out renditions” *TimesOnline* (2 Feb. 2009) (noting that “[i]n the executive orders the President merely promised a review of rendition policy, with the intention of ensuring that suspects were not sent to other countries to face torture”) available at: http://www.timesonline.co.uk/tol/news/world/us_and_americas/article5636297.ece ; and also G. Miller, “Obama preserves renditions as counter-terrorism tool” *Los Angeles Times* (1 Feb. 2009) (noting that “[u]nder executive orders issued by Obama recently, the CIA still has authority to carry out what are known as renditions, secret abductions and transfers to prisoners to countries that cooperate with the United States”) available at: <http://www.latimes.com/news/nationworld/washingtondc/la-na-rendition1-2009feb01,0,4661244.story>

⁶⁵ Center for Constitutional Rights, “CCR Praises Obama Orders, Cautions Against Escape Hatch for Torture”, (22 Jan. 2009) available at: <http://ccrjustice.org/newsroom/press-releases/ccr-praises-obama-orders-cautions-against-escape-hatch-torture>

64. Given that the review processes should conclude within six months of the date on which the executive orders were issued, a decision in the case currently before the Commission is particularly urgent as it may authoritatively impact upon the findings of the review in addition to the policies adopted by the new US administration.

c) The Petitioner's Case is Part of a Broader Pattern of Extraordinary Renditions and of Denial of Access to Justice and to an Effective Remedy Affecting a Large Number of Individuals

65. Documentation on the practice of 'extraordinary rendition' demonstrates that the petitioner's alleged treatment does not constitute an isolated case but rather forms part of a wider program. There are thus a considerable number of individuals who may potentially bring claims similar to the petitioner's for the treatment they have been subjected to. However, to date, those who have attempted to bring a claim in the US courts have been consistently denied justice. Even if the new US administration abandons the practice of 'extraordinary rendition' in the future, the individuals who have already been subjected to it will continue to be denied justice so long as the US courts maintain their line of jurisprudence.

66. When asked how many people have been rendered to another country, the Director of the CIA, General Michael Hayden, stated: "[m]id-range, two figures since September 11, 2001. A pace somewhat behind the number of renditions conducted in the 1990s".⁶⁶ He continued:

[t]he total number of people detained by the CIA is fewer than a hundred. In the life of the program, since the capture of Abu Zubaydah in March of 2002. Of these people detained, the number against whom we have used any kind of enhanced interrogation techniques is fewer than a third of the fewer than a hundred.⁶⁷

67. While the US maintains that "fewer than 100 people" have been subject to rendition, the extent of the practice of 'extraordinary rendition' is difficult to determine as the official information available in the public domain remains scarce and incomplete. The information which is available is the result of victim testimony and the investigative work of journalists, NGOs and bodies such as the Council of Europe. Where individuals are held at Guantánamo Bay, for example, they are often able to explain how they were transferred once they are given clearance to meet with their lawyers. However, if an individual is held at a 'black site' or at a detention site such as Bagram Airbase in Afghanistan, it is virtually

⁶⁶ CIA, "Transcript of Director Michael Hayden's Interview with Charlie Rose", (24 Oct. 2007), available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/interview-with-charlie-rose.html>

⁶⁷ *Id.*

impossible to gain information about their detention or how they were transferred there.

68. For example, in May 2004, General Barry McCaffrey (a retired US Army General) stated that, “[w]e’re probably holding around 3,000 people, you know, Bagram Air Field, Diego Garcia, Guantanamo, 16 camps throughout Iraq”.⁶⁸ However, it is not known how many of the 3,000 individuals were subject to rendition before being transferred to each detention site.
69. Estimates of the scale of the practice of ‘extraordinary rendition’ by independent bodies and organizations range between hundreds and thousands.
70. The Council of Europe Parliamentary Assembly has found that, “[r]endition’ affecting Europe seems to have concerned more than a hundred persons in recent years” and that “[h]undreds of CIA-chartered flights have passed through numerous European countries”.⁶⁹ It noted, however, that “to understand the notion of a ‘spider’s web’, what is important to bear in mind is not the overall numbers of flights; but rather the nature and context of individual flights”,⁷⁰ concluding that:

[t]he facts and information gathered to date, along with new factual patterns in the process of being uncovered, indicate that the key elements of this “spider’s web” have notably included: a world-wide network of secret detentions on CIA “black sites” and in military or naval installations; the CIA’s programme of “renditions”, under which terrorist suspects are flown between States on civilian aircraft, outside of the scope of any legal protections, often to be handed over to States who customarily resort to degrading treatment and torture; and the use of military airbases and aircraft transport detainees as human cargo to Guantanamo Bay in Cuba or to other detention centres.⁷¹

71. In 2006, the UN Committee against Torture expressed its concern at the US’ rendition program and called on the US to:

apply the *non-refoulement* guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to

⁶⁸ Interview with Deborah Norville for MSNBC Tonight (6 May 2004) available at: <http://www.msnbc.msn.com/id/4924989>

⁶⁹ Council of Europe Parliamentary Assembly, “Information Memorandum II” *supra* note 55 at para. 66. *See also*, European Parliament, “Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners”, *supra* note 52 at para. 78 (expressing “serious concern about the 170 stopovers made by CIA-operated aircraft at UK airports, which on many occasions came from or were bound for countries linked with extraordinary rendition circuits and the transfer of detainees”).

⁷⁰ Council of Europe Parliamentary Assembly, “Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states” (2006), *supra* note 51, at para. 50.

⁷¹ *Id.* at para. 7 of the Draft Resolution.

States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention.⁷²

72. In testimony before the Maher Arar Commission, “Human Rights Watch estimated that between 9/11 and June 2005, there were approximately 100 to 150 renditions”.⁷³
73. The organization Reprieve, which conducts investigations into ‘extraordinary renditions’ and acts as habeas corpus lawyers for a number of detainees held at Guantánamo Bay, notes that, “[a]ccording to the United States Congress, up to 14,000 people may have been victims of rendition and secret detention since 2001”.⁷⁴ Reprieve has also been quoted in the media as claiming that, “there have been more than 200 new cases of rendition since 2006, when President George Bush declared that the practice had stopped”.⁷⁵
74. Amnesty International has stated that it has “records of nearly 1,000 flights directly linked to the CIA, most of which have used European airspace”.⁷⁶
75. Despite the lack of certainty as to the number of individuals affected by the US’ post September 11, 2001 rendition program, the estimates outlined above demonstrate that the number of potential claimants seeking a remedy in the US courts could be considerable. This number could rise significantly with the implementation of the new administration’s policies.
76. However, just as the present case represents a broader practice of ‘extraordinary rendition’, it also represents a broader pattern of denying access to justice in cases where victims of ‘extraordinary rendition’ have attempted to bring a civil claim for compensation in the US courts.

⁷² UN Committee against Torture: Conclusions and Recommendations: United States of America (2006) *supra* note 48 at para. 20.

⁷³ Maher Arar Commission of Inquiry, “Factual Background Volume II”, *supra* note 42 at 524. See also, D. Priest “CIA Holds Terror Suspects in Secret Prisons”, the Washington Post (2 Nov. 2005), available at: http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644_pf.html (estimating about 70 renditions); J. Mayer *supra* note 54 (citing an estimate of 150); and “Terror Detainees Sent to Egypt” *Washington Times* (16 May 2005) (where the Egyptian Prime Minister said that more than 60 or 70 terror suspects had been sent to Egypt by the US since September 11, 2001) available at: <http://www.washingtontimes.com/news/2005/may/15/20050515-115906-5452/>. See also B. Ross and R. Esposito *supra* note 48 (noting that “[s]everal intelligence sources involved in both the enhanced interrogation program and the program to ship detainees back to their own country for interrogation - a process described as rendition, say that the number of detainees in each program has been added together to suggest as many as 100 detainees are moved around the world from one secret CIA facility to another”).

⁷⁴ Reprieve, “Enforced Disappearance, Illegal Interstate Transfer, and Other Human Rights Abuses Involving the UK Overseas Territories” at 4 (referencing Congressional Quarterly, August 2006).

⁷⁵ D. Campbell and R. Norton-Taylor, “US accused of holding terror suspects on prison ships” *The Guardian* (2 Jun. 2008) available at: <http://www.guardian.co.uk/world/2008/jun/02/usa.humanrights>

⁷⁶ Amnesty International, “USA: Below the radar” *supra* note 53, at section 2.5. See also, S. Grey and L. Harding, “Twist to terror suspects row as logs show 80 CIA planes visited UK” *The Guardian* (1 Dec. 2005) available at: <http://www.guardian.co.uk/world/2005/dec/01/politics.usa>

77. For example, in *Arar v. Ashcroft*, Mr. Maher Arar, a dual Canadian-Syrian citizen brought a civil claim for compensation against the former Attorney General John Ashcroft, the Director of the US Federal Bureau of Investigation (the “FBI”), the former Secretary of Homeland Security and a number of US immigration officials for his rendition from the US to Syria where he was arbitrarily detained and tortured. On 16 February 2006, the District Court for the Eastern District of New York dismissed Mr. Arar’s claim on the basis that the national security and foreign policy implications of the case prevented the judiciary from adjudicating the case.⁷⁷ The Court held that:

courts must proceed cautiously in reviewing constitutional and statutory claims in that arena [of combating terrorism] ... this case raises crucial national-security and foreign policy considerations, implicating “the complicated multilateral negotiations concerning efforts to halt international terrorism” ... The propriety of these considerations, including supposed agreements between the United States and foreign governments regarding intelligence-gathering in the context of the efforts to combat terrorism, are most appropriately reserved to the Executive and Legislative branches of government. Moreover, the need for much secrecy can hardly be doubted. One need not have much imagination to contemplate the negative effect on our relations with Canada if discovery were to proceed in this case and were it to turn out that certain high Canadian officials had, despite public denials, acquiesced in Arar’s removal to Syria. More generally, governments that do not wish to acknowledge publicly that they are assisting us would certainly hesitate to do so if our judicial discovery process could compromise them. Even a ruling sustaining state-secret-based objections to a request for interrogatories, discovery demand or questioning of a witness could be compromising. Depending on the context it could be construed as the equivalent of a public admission that the alleged conduct had occurred in the manner claimed—to the detriment of our relations with foreign countries, whether friendly or not ... In the international realm, however, most, if not all, judges have neither the experience nor the background to adequately and competently define and adjudge the rights of an individual vis-à-vis the needs of officials acting to defend the sovereign interests of the United States, especially in circumstances involving countries that do not accept our nation’s values or may be assisting those out to destroy us.

... the ability to define the line between appropriate and inappropriate conduct, in those areas, is not, as stated earlier, one in which judges possess any special competence. Moreover, it is an area in which the law has not been developed or specifically spelled out in legislation. Nor can we ignore the fact that an erroneous decision can have adverse consequences in the foreign realm not likely to occur in the domestic context. For example, a judge who, because of his or her experience living in the community, rejects a police claim that a certain

⁷⁷ *Arar v. Ashcroft*, Civil Action No. CV-04-0249 (DGT) (VVP), 414 F. Supp.2d 250, US Dist. Ct. Eastern District NY (16 February 2006).

demonstration is potentially violent and, as a result, allows the demonstration to proceed over the objections of these law-enforcement officials faces a much smaller risk that this decision will result in serious consequences even if, with the benefit of hindsight, his or her judgment turns out to be wrong. On the other hand, a judge who declares on his or her own Article III authority that the policy of extraordinary rendition is under all circumstances unconstitutional must acknowledge that such a ruling can have the most serious of consequences to our foreign relations or national security or both.

Accordingly, the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our foreign affairs and national security. Those branches have the responsibility to determine whether judicial oversight is appropriate. Without explicit legislation, judges should be hesitant to fill an arena that, until now, has been left untouched—perhaps deliberately—by the Legislative and Executive branches.⁷⁸

78. In June 2008, the US Court of Appeals for the Second Circuit upheld the lower court's decision by 2:1, finding, *inter alia*, that proceeding with the case would interfere with national security and foreign policy.⁷⁹ Judge Sack, dissenting in part, criticized the majority decision as giving license to federal official to “violate constitutional rights with virtual impunity”.⁸⁰ However, on 12 August 2008, the Second Circuit ordered that the Court of Appeal's decision would be reheard en banc by 12-13 judges on 9 December 2008.⁸¹
79. Similarly, in *Mohamed v. Jeppesen Dataplan Inc.*, five individuals brought a civil claim against a US-based corporation for its alleged assistance to the CIA in the ‘extraordinary rendition’ program through the provision of flight and logistical support services to aircraft used by the CIA to transport terrorist suspects to secret detention and interrogation around the world. As in Mr. El-Masri's case, the District Court for Northern California dismissed the complaint following the US Government's intervention in the case to invoke the ‘state secrets’ privilege, finding that:

[o]nce state secrets privilege is invoked, the Court should consider whether the case may proceed under that circumstance. The invocation of states secret privilege is a categorical bar to a lawsuit under the following circumstances: (1) if the very subject matter of the action is a

⁷⁸ *Id.* at 90 – 97.

⁷⁹ *Arar v. Ashcroft et. al.*, (Docket No. 06-4216-cv), United States Court of Appeals for the Second Circuit, 30 Jun. 2008.

⁸⁰ *Id.* at 88.

⁸¹ *Arar v. Ashcroft et. al.*, (Docket No. 06-4216-cv), United States Court of Appeals for the Second Circuit, Order of 12 August 2008. See also, J. Barron, “U.S. Appeals Court to Rehear Case of Deported Canadian”, *New York Times* (14 Aug. 2008) available at: <http://www.nytimes.com/2008/08/15/nyregion/15detain.html>

state secret; (2) if the invocation of the privilege deprives a plaintiff of evidence necessary to prove a *prima facie* case; and (3) if the invocation of the privilege deprives a defendant of information necessary to raise a valid defense. Since the Court finds that the very subject matter of this case is a state secret, the Court does not reach the other circumstances ...

In sum, at the core of Plaintiffs' case against Defendant Jeppesen are "allegations" of covert U.S. military or CIA operations in foreign countries against foreign nationals—clearly a subject matter which is a state secret. Accordingly, pursuant to 28 U.S.C. § 1331 and Federal Rule of Civil Procedure 12(b)(1), the United States' Motion to Dismiss is GRANTED with prejudice on the ground that the Court lacks subject matter jurisdiction.⁸²

80. *Mohamed v. Jeppesen Dataplan Inc.*, is currently pending before the US Court of Appeals for the Ninth Circuit. In a hearing on the 9 February 2009, the Justice Department under the Obama administration reasserted the 'state secrets' privilege and claimed that the case would undermine national security, thus maintaining the policy of the Bush administration.⁸³
81. While a relatively small number of cases have been brought so far in the US courts, other victims have spoken in the media of their intention to bring civil claims against the US, its officials and agents⁸⁴ for their alleged 'extraordinary rendition'. In light of the decisions in the petitioner's case, *Arar v. Ashcroft* and *Mohamed v. Jeppesen*, it is highly probable that future claims will also fail following US intervention in such cases to invoke the 'state secrets' privilege,⁸⁵ thereby creating a class of litigants unable to access justice.
82. An early decision by the Inter-American Commission as to the incompatibility of the US courts' application of the 'state secrets' privilege, which operates to deny victims of 'extraordinary rendition' access to court, with the right to a remedy in cases of 'extraordinary rendition', would therefore impact not only on the present case but also on all pending and future cases brought in the US which, as

⁸² *Mohamed v. Jeppesen Dataplan, Inc.*, WL 782802 (No. C07-02798 JW).

⁸³ See American Civil Liberties Union, "Justice Department Stands Behind Bush Secrecy In Extraordinary Rendition Case" (9 Feb. 2009) available at <http://www.aclu.org/safefree/torture/38695prs20090209.html> ; and also Center for Constitutional Rights, "Obama Fails on Transparency" (9 Feb. 2009) available at <http://ccrjustice.org/newsroom/press-releases/obama-fails-transparency>

⁸⁴ See, e.g., S. Baldauf, "Former Guantanamo Prisoner Asks U.S. to Review its Founding Ideals," *Christian Science Monitor*, (6 Feb. 2008) (detailing the plans of Adel Hassan Hamad, a Sudanese national rendered from Pakistan to Guantánamo Bay to sue the U.S. government) available at: <http://www.csmonitor.com/2008/0206/p01s05-woaf.html>

⁸⁵ In other cases brought by individuals detained at Guantánamo Bay, civil claims for compensation have been barred on the basis of a federal immunity law. See the decision of the D.C. Circuit Court of Appeals in *Rasul v. Myers* 512 F. 3d 644 (D.C. Cir. 2008) (11 Jan 2008). This case is currently under review after the Supreme Court, in December 2008, granted certiorari, vacated the underlying opinion and remanded the case for reconsideration in light of its opinion in *Boumediene v. Bush*, which earlier this year recognized the constitutional right of Guantánamo detainees to challenge detention through habeas corpus. See Center for Constitutional Rights, "Supreme Court Sends Guantanamo Torture Case Back to Lower Court" (15 Dec. 2008), available at: <http://ccrjustice.org/newsroom/press-releases/supreme-court-sends-guantanamo-torture-case-back-lower-court>

indicated above, could amount to a significant number given the estimates of how many ‘extraordinary renditions’ have taken place.

83. With the closure of Guantánamo Bay and other known and secret CIA detention sites around the world, the number of claims presented in US courts will potentially rise significantly. While the action taken by the US President reflect welcome developments, they do not reach far enough in terms of ensuring that victims of ‘extraordinary rendition’ have access to an effective remedy and full and adequate reparation. In this respect, a timely decision by the Inter-American Commission as to the legality of ‘extraordinary renditions’ and the compatibility of the ‘state secrets’ privilege with the right to a remedy in cases of ‘extraordinary rendition’ would provide an authoritative interpretation of the US’ international obligations, particularly under the American Convention and Declaration, to both the US executive and judiciary in assessing the admissibility of claims currently pending or on appeal and of future claims for compensation brought by victims of ‘extraordinary rendition’.

B. ‘EXTRAORDINARY RENDITION’ VIOLATES CORE RIGHTS UNDER DOMESTIC AND INTERNATIONAL LAW

84. As the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has previously noted, different usages of the term ‘rendition’ exist:

there are various forms of rendition. The transfer of a person from one jurisdiction to another (or from the custody and control of one State to another) can occur by various means, including: rendition under established extradition rules; removal under immigration law; resettlement under refugee law; or “rendition to justice”, where a person is outside formal extradition arrangements but is nevertheless handed to another State for the purpose of standing trial in that State. As long as there is full compliance with the obligation of non-refoulement, these mechanisms may be lawful, although it should be noted that the particular circumstances in which a person is “rendered to justice” may involve an unlawful detention. Impermissible under international law is the “extraordinary rendition” of a person to another State for the purpose of interrogation or detention without charge. Rendition in these circumstances also runs the risk of the detained person being made subject to torture or cruel, inhuman or degrading treatment. Detention without charge or for prolonged periods even when charged, also amounts to a violation of articles 9 and 14 of the ICCPR and may constitute enforced disappearance. Furthermore, the removal of a person outside legally prescribed procedures amounts to an unlawful detention in violation of article 9 (1) of the ICCPR, and raises other human rights concerns if a detainee is not given a chance to challenge the transfer.⁸⁶

⁸⁶ Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Addendum: Mission to the United States of America”, U.N. Doc. No. A/HRC/6/17/Add.3 (22 November 2007) at para. 36.

85. ‘Extraordinary rendition’, while not a legal term, entails multiple and serious violations of international law including, but not limited to, the absolute prohibition of torture and other ill-treatment; the absolute prohibition against transferring a person to a place where there are substantial grounds for believing that he or she would be in danger of being subjected to torture and other ill-treatment (the principle of *non-refoulement*); the right to liberty and security of the person; and the prohibition against enforced disappearance. As one commentator notes,

[e]xtraordinary rendition is a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals. It involves the state-sponsored abduction of a person in one country, with or without the cooperation of the government in that country, and the subsequent transfer of that person to another country for detention and interrogation.⁸⁷

86. In particular, the practice of ‘extraordinary rendition’ gives rise to violations of US treaty obligations under the American Convention and Declaration, the International Covenant on Civil and Political Rights (“ICCPR”) and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).

1) ‘Extraordinary Rendition’ Violates the Absolute Prohibition of Torture and other Ill-Treatment

87. The absolute prohibition of torture and other ill-treatment is universally recognized. It is set out in all the major international and regional human rights instruments, including the American Convention and Declaration,⁸⁸ is reflected in customary international law; and enjoys *jus cogens* status as a peremptory norm under international law⁸⁹ from which no derogation is permitted.⁹⁰

⁸⁷ David Weissbrodt and Amy Bergquist, “Extraordinary Rendition: A Human Rights Analysis”, 19 Harv. Hum. Rts. J. 123 (2006) at 127.

⁸⁸ See, e.g., American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 Jul. 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) (“American Convention”) (Article 5); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (“American Declaration”) (Articles I, XXV and XXVI); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 Mar. 1976 (“ICCPR”) (Article 7); African Charter on Human and Peoples’ Rights, adopted 27 Jun. 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 Oct. 1986 (“African Charter”)(Article 5); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov.1950 ETS 5, entered into force 3 Sep. 1953 (“ECHR”) (Article 3); Arab Charter on Human Rights, adopted by the League of Arab States, reprinted in 18 Hum. Rts. L.J. 151 (1997) (Article 13); and United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).

⁸⁹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331 (“Vienna Convention”) (Article 53).

⁹⁰ See, e.g., *Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992).

88. The Inter-American Commission has stated that, “[w]ithin the inter-American system, the right to humane treatment is prescribed principally in Articles I, XXV and XXVI of the American Declaration and Article 5 of the American Convention”.⁹¹ The Inter-American Commission continued:

[t]he American Convention prohibits the imposition of torture or cruel, inhuman or degrading treatment or punishment on persons under any circumstances. While the American Declaration does not contain a general provision on the right to humane treatment, the Commission has interpreted Article I of the American Declaration as containing a prohibition similar to that under the American Convention. In fact it has specified that “[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*.”

89. It has also qualified the prohibition of torture as a norm of *jus cogens*.⁹² In particular, the Inter-American Commission has clearly stated that:

[w]ithin the inter-American human rights system, Article I of the American Declaration sets forth the right of every person to “life, liberty and personal security.” An essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*.⁹³

90. The practice of ‘extraordinary rendition’ may violate the absolute prohibition of torture and other ill-treatment in three ways. First, in the treatment of the individual in preparation for and/or during the rendition flight itself. Second, as a result of exposing the individual to the risk of torture or other ill-treatment in violation of the absolute principle of *non-refoulement*. Third, as a result of the treatment of the individual on arrival at the detention site.

The Treatment of the Individual in Preparation for and/or During the Rendition Flight May Constitute Torture or Other Ill-Treatment

91. As documented in the petition currently before the Court, testimonies by victims of ‘extraordinary rendition’ often provide similar accounts of the way in which the rendition took place: typically involving the removal of the ‘suspect’s’ clothes by hooded individuals followed by body cavity searches, beatings and the insertion of an unidentified drug into the rectum. A diaper, overalls, blindfold,

⁹¹ Inter-American Commission on Human Rights (“IACHR”), “Report on Terrorism and Human Rights”, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (22 Oct. 2002) at para. 149.

⁹² IACHR, “Report on Terrorism and Human Rights”, *id.* at para. 155 citing, for example, *Juan Antonio Aguirre Ballesteros (Chile)*, IACHR Case 9437 Resolution N° 5/85 (24 July 1985), Annual Report of the IACHR 1984-1985; and IACHR, “Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System”, OEA/Ser.L/V/II.106, Doc. 40 rev., (28 February 2000), at paras. 118 and 154.

⁹³ IACHR, “Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System”, *id.* at para. 118.

hood and ear mufflers are often placed on the individual who is then chained in a painful position throughout the duration of the flight.⁹⁴ In such cases, the treatment of the individual in preparation for and/or during the rendition flight itself may constitute torture or other ill-treatment in violation of Article 5 of the American Convention, Articles I, XXV and XXVI of the American Declaration, Articles 1 and 16 of the CAT, and Articles 7 and 10 of the ICCPR.

The ‘Extraordinary Rendition’ May Violate the Absolute Principle of Non-Refoulement

92. The act of transferring an individual to a state where substantial grounds exist for believing that he or she would be at a risk of torture or other ill-treatment is prohibited under international law. This case concerns the alleged ‘extraordinary rendition’ of the petitioner from Macedonia to Afghanistan, where he alleges he was arbitrarily detained, tortured and ill-treated. A key aspect of the case is therefore the US’ responsibility for the removal of the petitioner in violation of the absolute principle of *non-refoulement*.
93. Article 22 of the American Convention expressly prohibits *refoulement*, as does Article 3 of the CAT. In addition, Article 7 of the ICCPR, which contains an absolute prohibition on torture, has been interpreted by the UN Human Rights Committee to include the absolute principle of *non-refoulement*.⁹⁵
94. The absolute principle of *non-refoulement* constitutes a *jus cogens* norm and, as such, it binds the US under principles of customary international law. The UN Committee against Torture, as the authoritative interpretative body of the CAT, has stated that the absolute principle of *non-refoulement* “must be recognized as a peremptory norm under international law, and not merely as a principle enshrined in article 3 of the Convention”.⁹⁶
95. The absolute principle of *non-refoulement* is an integral part of the absolute prohibition of torture and other ill-treatment. The absolute prohibition of torture and other ill-treatment not only imposes a negative duty on states to refrain from torturing but also a range of positive obligations including the obligation to “prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture”.⁹⁷ Any other approach would, as stated by the European Court of Human Rights (the “European Court”), allow states to circumvent the

⁹⁴ See, for examples, footnote 39.

⁹⁵ Human Rights Committee, General Comment No. 20, Article 7, (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. No. HRI/GEN/1/Rev.1 at 30 (1994) at para. 9 (“HRC General Comment 20”).

⁹⁶ UN Committee against Torture, Summary Record of the 624th Meeting, U.N Doc. No. CAT/C/SR.624 (24 Nov. 2004), at para. 52.

⁹⁷ See interim report of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, U.N. Doc. No. A/59/324 (1 Sep. 2004) at para. 27.

prohibition of torture by arguing that they did not inflict the torture themselves: an approach which would “plainly be contrary to the spirit and intendment of [Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms].”⁹⁸ The principle of *non-refoulement* is thus an “inherent and indivisible part” of the prohibition of torture.⁹⁹

96. Both the UN Human Rights Committee and Committee against Torture have found that the principle of *non-refoulement* applies regardless of whether the sending state deports, extradites or removes an individual from its own territory or elsewhere:

[t]he State party should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of *inter alia* their transfer, rendition, extradition, expulsion or refoulement if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.¹⁰⁰

97. Human rights courts and bodies have taken an expansive approach to the obligation of *non-refoulement* because of its absolute nature and the importance of protecting the security of the individual to be returned. For example, both the UN Human Rights Committee and the Committee against Torture have interpreted the obligation as also prohibiting the return of individuals to states from where they would be in danger of being expelled to a third country or territory where there would be such a risk.¹⁰¹
98. Human rights courts and bodies have consistently confirmed the absolute nature of the principle of *non-refoulement*, which allows no limitations, derogation or exceptions.¹⁰² The obligation of *non-refoulement*, like the prohibition of torture, therefore, applies to all persons without distinction. The victim’s conduct, however “undesirable or dangerous” is irrelevant: the Committee against Torture

⁹⁸ *Soering v. United Kingdom*, Eur. Ct. H.R., App. No. 14038/88 (7 Jul. 1989) at para. 88.

⁹⁹ *Soering v. United Kingdom*, *id.* at para. 88. See also, HRC General Comment 20, *supra* note 95 at para. 9.

¹⁰⁰ Human Rights Committee, “Concluding Observations: United States of America” *supra* note 50 at para. 16. See also, Committee against Torture, “Conclusions and Recommendations: United States of America” *supra* note 48 at para. 20.

¹⁰¹ Committee Against Torture, General Comment No. 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22), U.N. Doc. No. A/53/44 (1998) (“Comm. Against Torture General Comment No. 1”) at para. 2; *Avedes Hamayak Korban v. Sweden*, Comm. Against Torture, U.N. Doc. No. CAT/C/21/D/88/1997 at para. 7; and HRC General Comment No. 31, [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. No. CCPR/C/21/Rev.1/Add.13 (26 May 2004) at para. 12.

¹⁰² See, e.g., CAT (Article 2(2)); HRC General Comment No. 20, *supra* note 95 at para. 3; HRC General Comment No. 29: States of Emergency (Article 4), U.N. Doc. No. CCPR/C/21/Rev.1/Add.11 (31 Aug. 2001) (“HRC General Comment 29”) at para. 7. For the Committee Against Torture’s approach see, e.g., *Tapia Paez v. Sweden*, U.N. Doc. No. CAT/C/18/D/39/1996 (28 Apr. 1997) at para. 14.5. See also, HRC Concluding Observations: Canada, U.N. Doc. No. CCPR/C/CAN/CO/5 (20 Apr. 2006) at para. 15; *Chahal v. United Kingdom*, Eur. Ct. H.R., App. No. 22414/93 (15 Nov. 1996) at paras. 79-80; and *Aemei v. Switzerland*, Comm. Against Torture, U.N. Doc. No. CAT/C/18/D/34/1995 (29 May 1997) at para. 9.8. In fact, a recent U.N. World Summit Outcome Document reaffirmed this point and, importantly, was adopted with the consensus of all States (see U.N. Doc. No. A/RES/60/1 (24 Oct. 2005) para. 85).

has found that Article 3 of the CAT extends in equal terms to “common criminals” and persons considered to be threats to national security.¹⁰³ International human rights courts and bodies have repeatedly rejected the contention that national security interests can be ‘balanced’ against the absolute principle of *non-refoulement*.¹⁰⁴ Moreover, the European Court has rejected arguments that a higher standard of proof should be applied to individuals who are considered “undesirable or dangerous”.¹⁰⁵

99. The Committee against Torture has affirmed this position in a line of cases, underscoring in *Agiza v. Sweden* that “the Convention’s protections are absolute, even in the context of national security concerns”.¹⁰⁶
100. In 1996, twelve judges of the Grand Chamber of the European Court rejected the UK’s arguments in *Chahal v. United Kingdom*, finding that “even in the event of a public emergency threatening the life of the nation,” the prohibition of torture or inhuman or degrading treatment or punishment in Article 3 of the European Convention on Human Rights (the “ECHR”) was absolute and non-derogable.¹⁰⁷ More recently, in 2008, the European Court reaffirmed in *Saadi v. Italy* that: “[e]ven if ... the terrorist threat has increased since [the *Chahal* judgment in 1996], that circumstance would not call into question the conclusions of the *Chahal* judgment concerning the consequences of the absolute nature of Article 3”.¹⁰⁸
101. Where an individual is denied the opportunity to challenge his or her removal by judicial or administrative review, the state commits a procedural violation of the principle of *non-refoulement* in addition to the substantive breach.¹⁰⁹ For example, in *Alzery v. Sweden*, the UN Human Rights Committee found that, “[t]he absence of any opportunity for effective, independent review of the decision to expel in

¹⁰³ *M.B.B. v. Sweden*, Comm. Against Torture, U.N. Doc. No. CAT/C/22/D/104/1998 (1999), at para. 6.4 (Comm. Against Torture 1999). See also, *Agiza v. Sweden*, Comm. Against Torture, UN. Doc. No. CAT/C/34/D/233/2003 (24 May 2005) (finding a substantive breach of Article 3 of CAT by removing Mr. Agiza from Sweden to Egypt when there were “substantial grounds for believing that he ... would be in danger of being subjected by the Egyptian authorities to torture” at paras. 13.2-13.4; and a procedural breach of Article 3 as “the absence of any avenue of judicial or independent administrative review of the Government’s decision to expel the complainant does not meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention” at para. 13.8). See also *D v. United Kingdom*, Eur. Ct. H.R., App. No. 30240/96 (2 May 1997) at para. 47.

¹⁰⁴ *Chahal v. United Kingdom*, supra note 102 at para. 79; and *Saadi v. Italy*, Eur. Ct. H.R., App. No. 37201/06 (28 Feb. 2008) at paras 138-141.

¹⁰⁵ *Saadi v. Italy id.* at paras. 139-40, and at para. 2 of the Concurring Opinion of Judge Zupančič: “[i]t is intellectually dishonest on the other hand to suggest that expulsion cases require a low level of proof simply because the person is notorious for his dangerousness”.

¹⁰⁶ *Agiza v. Sweden*, supra note 103 at para. 13.8. See also, *Aemei v. Switzerland*, supra note 102, at para. 9.8 ; *M.B.B. v. Sweden*, supra note 103, at para. 6.4; and *Arana v. France*, Comm. Against Torture, U.N. Doc. No. CAT/C/23/D/63/1997 (2000), at paras. 11.5-12).

¹⁰⁷ *Chahal v. United Kingdom*, supra note 102 at para. 79.

¹⁰⁸ *Saadi v. Italy*, supra note 104 at para. 141.

¹⁰⁹ See *Agiza v. Sweden*, supra note 103 at paras. 13.6-13.8 and *Alzery v. Sweden*, supra note 39, at para. 11.8.

the author's case accordingly amounted to a breach of article 7, read in conjunction with Article 2 of the Covenant".¹¹⁰

102. As the petitioner alleges that he was denied the opportunity to effectively challenge his removal to Afghanistan, both a substantive and procedural breach of the absolute principle of *non-refoulement* can be found.

Further Responsibility Ensues in Cases in which the Individual is Subjected to Torture or Ill-treatment at the Detention Site

103. Each state involved in the transfer of an individual to a state where substantial grounds exist for believing that he or she would be at risk of torture incurs responsibility under the absolute principle of *non-refoulement*. This responsibility results from the exposure of the individual to a risk of torture. It is irrelevant for the purposes of establishing liability under the absolute principle of *non-refoulement* whether or not the individual is ultimately tortured as the breach is determined at the point of removal and is not determined by subsequent events.
104. However, in cases where an individual is ultimately tortured, any state involved in the transfer may incur additional and separate responsibility for this violation even if the state(s) carrying out the rendition had no involvement in the eventual detention and treatment of the individual at the detention site. If the 'extraordinary rendition' violates the principle of *non-refoulement*, the sending state will still be responsible for any torture or ill-treatment to which the individual is subjected after arrival at the detention site. As the UN Human Rights Committee found in *Mansour Ahani v. Canada*:

[i]n the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party.¹¹¹

105. Moreover, the Inter-American Court has recognized that arbitrary detention creates a situation which facilitates the violation of other rights, such as the right to humane treatment. As reiterated by the Court in the *Cantoral Benavides* case:

a person illegally detained [...] is in a situation of heightened vulnerability in which there is a high risk of his/her rights being violated, such as the right to physical integrity and to be treated with dignity.¹¹²

¹¹⁰ *Alzery v. Sweden*, *supra* note 39, at para. 11.8.

¹¹¹ *Mansour Ahani v. Canada*, HRC, U.N. Doc. No. CCPR/C/80/D/1051/2002 (2004), at para 12.

¹¹² *Cantoral Benavides v. Peru*, Inter-Am. Ct. H.R., (Ser. C) No. 69 (2000) at para. 90.

106. In addition, arbitrary detention, particularly where a person is held incommunicado and in isolation, constitutes in itself a form of torture or other prohibited ill-treatment. In the *Maritza Urrutia* case, the Inter-American Court summarized its jurisprudence on this issue:

the Court ... has also stated that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and of the right of any detainee to respect for his inherent dignity as a human being.” Solitary confinement produces moral and psychological suffering in the detainee, placing him in a particularly vulnerable position. The Court has also indicated that even if the unlawful detention has only lasted a short time, it is sufficient to constitute a violation of physical and moral integrity according to the standards of international human rights law, and that, in the presence of these circumstances, it is possible to infer, even when there is no other evidence in this respect, that the treatment received during solitary confinement is inhuman and degrading.¹¹³

2) ‘Extraordinary Rendition’ Constitutes a Violation of the Right to Liberty and Security of the Person

107. Second, ‘extraordinary rendition’ typically involves the seizure, prolonged detention and transfer of an individual without charge, without the opportunity to challenge the basis of their detention, and without periodic judicial review. This constitutes a violation of the right to liberty and security of the person, and the right to be protected from arbitrary detention contrary to Article 7 of the American Convention, Articles I and XXV of the American Declaration, Article 9 of the ICCPR,¹¹⁴ and Articles 3 and 9 of the Universal Declaration of Human Rights 1948 (the “UDHR”).
108. Since ‘extraordinary rendition’ takes place outside of any legal process, it also violates “the right to recognition as a person before the law” under Article 3 of the American Convention, Article XVII of the American Declaration, Article 16 of the ICCPR and Article 6 of the UDHR.

3) ‘Extraordinary Rendition’ Constitutes a Violation of the Prohibition on Enforced Disappearance

109. Finally, ‘extraordinary rendition’ may also constitute a form of enforced disappearance.¹¹⁵ Article 2 of the recently agreed International Convention for the

¹¹³ *Martiza Urrutia v. Guatemala*, Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003) at para. 87.

¹¹⁴ See, e.g., *C. v. Australia*, HRC, U.N. Doc. No. CCPR/C/76/D/900/1999 (2002) at para. 8.2: “...whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee’s view, arbitrary and constituted a violation of article 9, paragraph 1”.

¹¹⁵ The UN Human Rights Committee has held that the abduction of a person, failure to provide information about a person, and official denial of any arrest and prolonged incommunicado detention can itself constitute cruel and inhuman treatment in violation of Article 7 of the ICCPR. See, e.g., *Mojica v. Dominican Republic*, HRC, U.N. Doc. No.

Protection of All Persons from Enforced Disappearance of 2006, not yet entered into force, sets out the elements of enforced disappearance as,

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.¹¹⁶

110. Since ‘extraordinary rendition’ involves the kidnap and/or arbitrary detention of an individual without access to a lawyer, contact with his or her family or consulate, or the ability to challenge their detention before a court of law, the transfer takes place outside of any legal process. Further, until the US discloses the whereabouts of the individual, they are ‘disappeared’. Accordingly, the UN Committee against Torture in its Conclusions and Recommendations on the US concluded that it was “concerned by reports of the involvement of the State party in enforced disappearances. The Committee considers the State party’s view that such acts do not constitute a form of torture to be regrettable”.¹¹⁷
111. In the landmark decision of *Velásquez Rodríguez v. Honduras*, the Inter-American Court found that:

[t]he forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obliged to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee’s right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty...¹¹⁸

112. The Inter-American Court’s summary of the impact of disappearances in *Velásquez Rodríguez* is equally applicable to the practice of ‘extraordinary rendition’:

[t]he practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. The

CCPR/C/51/D/449/1991(1994) at para. 5.7; *Jegatheeswara Sarma v. Sri Lanka*, HRC, U.N. Doc. No. CCPR/C/78/D/950/2000 (2003) at para. 9.5.

¹¹⁶ International Convention for the Protection of All Persons from Enforced Disappearance, (New York, 20 Dec. 2006), text: U.N. Doc. No. A/61/488 (Article 2). See also, *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R., Ser. C (No. 4) (29 Jul. 1988) at paras. 155-158.

¹¹⁷ Committee against Torture, “Conclusions and Recommendations: United States of America”, *supra* note 48 at para. 18.

¹¹⁸ *Velásquez Rodríguez v. Honduras*, (1988) *supra* note 116, at para. 155.

existence of this practice, more over, evinces a disregard of the duty to organize the State in such a manner as to guarantee the rights recognized in the Convention, as set out below.¹¹⁹

113. At a minimum, therefore, ‘extraordinary rendition’ violates three of the most fundamental and core human rights of the Inter-American system on human rights and international law more broadly: the right to liberty and security of the person, and the right to recognition as a person before the law; the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (of which the absolute principle of *non-refoulement* is an integral part); and the prohibition against enforced disappearance where detention is unacknowledged or the fate or whereabouts of the person is concealed. Taken separately, the violation of any of these rights would be particularly serious; the fact that they are committed together underscores the utmost gravity and severity of such a practice.

C. THE APPLICATION OF THE ‘STATE SECRETS’ PRIVILEGE BY US COURTS VIOLATES THE RIGHT TO A REMEDY

114. As a multiple violation of the American Convention and Declaration, and international law more broadly, individuals who have an ‘arguable claim’¹²⁰ that they have been victims of ‘extraordinary rendition’ have the right to an effective remedy and full and adequate reparation. The right to a remedy is not only an integral part of the absolute principle of *non-refoulement* but is also a freestanding right, which is itself guaranteed and has been recognized as non-derogable.¹²¹ Indeed, in relation to ‘extraordinary rendition’ specifically, the UN Human Rights Committee has found that the US should “conduct thorough and independent investigations into the allegations that persons have been sent to third countries where they have undergone torture or cruel, inhuman or degrading treatment or punishment, modify its legislation and policies to ensure that no such situation will recur, and provide appropriate remedy to the victims”.¹²²
115. While victims of torture have the right to an effective remedy and full and adequate reparation under international law, the petitioner was denied access to justice through the US courts in order to present his claim that he was a victim of a violation of ‘extraordinary rendition’.
116. While the protection of national security interests may reflect a legitimate aim of the state concerned, national security interests cannot be asserted in order to

¹¹⁹ *Velásquez Rodríguez v. Honduras id.* at para. 158.

¹²⁰ See, for example, *Silver and Others v. United Kingdom*, Eur. Ct. H.R. App. Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (25 Mar. 1983) at para. 113; and *Kaya v. Turkey*, Eur. Ct. H.R., App. No. 22729/93 (19 Feb. 1998) at para. 107.

¹²¹ HRC General Comment No. 29, *supra* note 102 at para. 14. See also, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Inter-Am. Ct. H.R. Advisory Opinion OC-9/87, (Ser. A) No. 9 (1987). (6 Oct. 1987) at para. 24.

¹²² HRC Concluding Observations: United States of America (2006), *supra* note 50 at para. 16.

extinguish the right to a remedy altogether. Rather, the right to a remedy must be constrained in a proportionate and least restrictive way in order to uphold the right to a remedy while accommodating national security concerns. In the petitioner's case however, this was not done: the US courts failed to consider ways in which they could accommodate national security concerns while affording the individual a remedy. Rather, the US courts applied the 'state secrets' privilege as a blanket bar to litigation, thereby resulting in a violation of the right to a remedy under international law.

1) Victims of 'Extraordinary Rendition' Have a Right to a Satisfactory Remedy

117. The Inter-American Court has repeatedly held that "the right to effective recourse to a competent national court or tribunal is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention".¹²³ This right necessarily encompasses the right of the individual to complain and to have his or her case examined by competent judicial authorities in the state or states allegedly responsible for the violation. For example, in the *Blake Case*, the Inter-American Court stated:

Article 8(1) of the American Convention bears a direct relation to Article 25 in conjunction with Article 1(1) of the Convention, which guarantees to all persons a simple and rapid recourse so that, among other things, those responsible for human rights violations will be tried and reparations may be obtained for the damages suffered. As the Court has stated, Article 25 "is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention" inasmuch as it contributes decisively to assure access to justice.¹²⁴

118. Similarly, in *Velásquez Rodríguez*, the Inter-American Court held that:

[u]nder the Convention, State Parties have an obligation to provide effective judicial remedies to the victims of human rights violations (Art. 25 [of the American Convention]), remedies that must be sustained in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subjected to their jurisdiction (Art. 1).¹²⁵

119. The right to an effective remedy and full and adequate reparation for torture and other violations of fundamental human rights has been affirmed by a range of treaties (such as Articles 1, 25 and 41 of the American Convention, Articles II, XVII, XVIII and XXIV of the American Declaration, Articles 2(3), 9(5) and

¹²³ *Castillo Páez v. Peru*, Inter-Am. Ct. H.R., (Ser. C) No. 34 (1997) (3 Nov. 1997) at para. 82.

¹²⁴ *Blake v. Guatemala (Reparations)*, Inter-Am. Ct. H.R. (Ser. C) No. 48 (1999) (22 Jan. 1999) at para. 63.

¹²⁵ *Velásquez Rodríguez v. Honduras* (Preliminary Objections) Inter-Am. Ct. H.R. (Ser. C.) No. 1 (1987) (26 Jun. 1987) at para. 91.

14(6) of the ICCPR, and Article 14 of the CAT); and by the UN Committee against Torture¹²⁶ and Human Rights Committee,¹²⁷ and regional courts.¹²⁸

120. This jurisprudence is confirmed by the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (the “Basic Principles on a Right to a Remedy and Reparation”), which codify the right to a remedy and reparation under international law and provide, at Principle 11, that:

[r]emedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

- a) Equal and effective access to justice;
- b) Adequate, effective and prompt reparation for the harm suffered;
- c) Access to relevant information concerning violations and reparation mechanisms.¹²⁹

121. The Principles provide that states are obligated to provide victims with “fair, effective and prompt access to justice” (Principle 2(b)) and make available “adequate, effective, prompt and appropriate remedies, including reparation” (Principle 2(c)). In particular, Principle 12 provides that:

[a] victim of a gross violation of international human rights law or a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities, and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.

Principles 18 to 23 define reparation, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

122. Similarly, the *UN Set of Principles for the protection and promotion of human rights through action to combat impunity* (the “Impunity Principles”) set out the right to justice.¹³⁰

¹²⁶ Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, U.N. Doc. No. CAT/C/GC/2 (24 Jan. 2008), at para. 15.

¹²⁷ See, for example, HRC General Comment No. 31, *supra* note 101, at paras. 15-17.

¹²⁸ See, for example, *Velásquez Rodríguez v. Honduras* (1988), *supra* note 116 at para. 174. See also, ECHR (Article 13).

¹²⁹ U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, at Principle 11.

123. As the Inter-American Court has found, “the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking”.¹³¹
124. The Inter-American Court, the European Court and the UN Human Rights Committee have repeatedly emphasized that the right to a remedy must be effective and not merely illusory or theoretical,¹³² and must be suitable to grant appropriate relief for the legal right that is alleged to have been infringed.¹³³
125. It follows from all of the above that the petitioner is entitled to a remedy and reparation for the violations of his right be free from torture and other ill-treatment, his right to liberty and security, and his right to be free from enforced disappearance.
126. In relation to the absolute principle of *non-refoulement*, the petitioner is entitled to a remedy and reparation for both the procedural and substantive violations of this principle. For example, in *Alzery v. Sweden*, the UN Human Rights Committee, after considering the efficacy of review mechanisms in expulsion cases, concluded that in addition to any breach which resulted from the absence of the same, the State Party was obligated to afford full and effective reparation, for both the lack of any review mechanism as well as for the resulting *refoulement*: “[i]n accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under an obligation to avoid similar violations in the future”.¹³⁴

2) Any Constraint on the Right to a Remedy Must be Proportionate and the Least Restrictive as Possible

127. In the petitioner’s case, the US Court of Appeals for the Fourth Circuit held that “[t]he Supreme Court has recognized that some matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked”¹³⁵ and that “no attempt is made to balance the need for secrecy of the

¹³⁰ Commission on Human Rights, “Report of the Independent Expert to Update the Set of Principles to Combat Impunity: Diane Orentlicher: Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity” U.N. Doc. No. E/CN.4/2005/102/Add.1 (8 February 2005) at Part III, Principles 19-30.

¹³¹ Judicial Guarantees in States of Emergency, Inter-Am. Ct. H.R., *supra* note 121 at para. 24.

¹³² *Judicial Guarantees in States of Emergency*, Inter-Am. Ct. H.R., *supra* note 121 at para. 24. *See also*, *Cordova v. Italy* (No. 1), Eur. Ct. H.R., App. No. 40877/98, (30 Jan. 2003) at para. 58; *Aksoy v. Turkey*, Eur. Ct. H.R., App. No. 21987/93 (18 Dec. 1996) at para. 95; and *Deon McTaggart v Jamaica*, HRC, U.N. Doc. No. CCPR/C/62/D/749/1997 (3 Jun. 1998) at paras. 10-11.

¹³³ *See*, e.g., *Velásquez Rodríguez Case* (1988), *supra* note 116 at paras. 64 and 66.

¹³⁴ *Alzery v. Sweden*, *supra* note 39 at para. 13.

¹³⁵ *El-Masri v. Tenet*, *supra* note 8 at para. 26.

privileged information against a party's need for the information's disclosure,"¹³⁶ meaning that the Court gave no consideration to the petitioner's right to a remedy.

128. States can introduce adjustments to the practical functioning of the procedures governing judicial remedies. However, such limitations or adjustments apply foremost to the procedural aspects of the exercise of the right to an effective remedy, and must not result in the removal of this fundamental right altogether; the substance of the right cannot be suspended or derogated from, even in times of emergency.¹³⁷
129. Any proposed restriction on the right to an effective remedy must be assessed on a case-by-case basis,¹³⁸ must pursue a legitimate aim, and be proportionate and strictly necessary in a democratic society.¹³⁹
130. As the burden of proof on the party seeking the restriction is particularly high and because the "essence" of the right to an effective remedy cannot be removed, abstract or general assertions of the relevance of "special factors" such as foreign affairs or national security cannot restrict the right to an effective remedy in any way. Any purported restriction on either of these grounds must be concretely advanced by the party seeking the restriction – not the court *ab initio*. The party seeking the restriction must also demonstrate why a particular and identifiable aspect of foreign affairs or national security justifies the restriction sought using the two-part test of (1) pursuant to a legitimate aim, (2) proportionality and strictly necessary in a democratic society. Without such a rigorous approach, the court could not be in a position to consider the proposed restriction, let alone decide upon its application.

a) *The Starting Point for Examining this Case is the Right to a Remedy and Not the 'State Secrets' Privilege*

131. It is respectfully submitted that the US Court of Appeals for the Fourth Circuit was misdirected in its analysis of the two interests at issue. The US Court characterized the 'state secrets' privilege as the primary rule and failed to take into account the "party's need for the information's disclosure"¹⁴⁰ once the privilege was invoked.
132. However, on a proper reading of the two interests, the right to a remedy constitutes the primary rule and the Court was under a duty to ensure that, in its

¹³⁶ *El-Masri v. Tenet*, *supra* note 8 at para. 24.

¹³⁷ HRC General Comment No. 29, *supra* note 102 at para 14.

¹³⁸ See e.g., *Waite & Kennedy v. Germany*, Eur. Ct. H.R., App. No. 26083/94 (18 Feb. 1999) at paras. 59 and 64 (in respect of Article 6 ECHR).

¹³⁹ See e.g., *Golder v. United Kingdom*, Eur. Ct. H.R., App. No. 4451/70 (21 Feb. 1975) at paras. 37-40 (in respect of Article 6 ECHR) ; *Alba Pietrarola v. Uruguay*, HRC, U.N. Doc. No. CCPR/C/OP/1 at 76 (1984) at para. 16 (in respect of Article 25 ICCPR).

¹⁴⁰ *El-Masri v. Tenet*, *supra* note 8 at para. 24.

handling of privileged materials, it did not abrogate or extinguish this fundamental right.

133. In relation to freedom of expression, in *Sunday Times v. United Kingdom*, the European Court held that:

[a]s the Court remarked in its Handyside judgment, freedom of expression constitutes one of the essential foundations of a democratic society ... The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.¹⁴¹

134. While this decision focused on the right to freedom of expression, it applies equally in the case of the right to a remedy which, as set out above, is also a fundamental right. The decision therefore demonstrates that the proper starting point in the petitioner's case should have been the acknowledgement of his fundamental right to a remedy. Only then, should any exceptions, such as the 'state secrets' privilege, have been considered.

135. In order to determine whether the 'state secrets' privilege could properly restrict the right to a remedy in the petitioner's case, the Court should have then conducted a two-part test. First, the restriction on the right to a remedy must pursue a legitimate aim. Second, the effects of the restriction must be proportionate to the aim pursued and in doing so must employ the least restrictive means possible.

b) *The Restriction on the Right to a Remedy Must Pursue a Legitimate Aim*

136. The reason for limiting the right to a remedy must be legitimate. While national security interests may constitute a legitimate aim,¹⁴² they will only be considered legitimate when they are genuinely tailored to protecting such interests and not merely aimed at protecting states from embarrassment or at preventing the exposure of illegal activity, because security agencies are subject to the same democratic principles of governance as all other state organs.¹⁴³

137. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, demonstrate the high threshold required in order for national security to constitute a legitimate aim:

¹⁴¹ *Sunday Times v. United Kingdom*, Eur. Ct. H.R., App. No. 6538/74 (26 Apr. 1979) at para. 65.

¹⁴² *Ždanoka v. Latvia*, Eur. Ct. H.R., App. No. 58278/00 (17 Jun. 2004) at para. 86 (in respect of Article 3 of Protocol No. 1). See also, to similar effect, the Grand Chamber judgment in *Ždanoka v. Latvia* (16 Mar. 2006) at para. 118.

¹⁴³ See, Principle 2(b) of the "Johannesburg Principles on National Security, Freedom of Expression and Access to Information", U.N. Doc. No. E/CN.4/1996/39 (1996) (1 Oct. 1995) (setting out that "a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest").

[n]ational security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.¹⁴⁴

138. Because of the potential dangers to a democratic society, the threshold required for national security to constitute a legitimate limitation on judicial remedies is particularly high.¹⁴⁵ As set out above, national security concerns cannot be asserted in the abstract. Rather, courts must be in the position to test the propriety and legitimacy of the national security claim in the particular circumstances of the case, especially in terms of its impact on the right to a remedy.¹⁴⁶
139. As set out by the Inter-American Court in *Myrna Mack-Chang v. Guatemala*:

[t]he Court deems that in cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.

The Court shares the statement of the Inter-American Commission with respect to the following:

¹⁴⁴ Principles 29-32 of the "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", U.N. Economic and Social Council, U.N. Doc. No. E/CN.4/1985/4, Annex (1985).

¹⁴⁵ Principles 29-32 of the Siracusa Principles *id.*

¹⁴⁶ See, *Tinnelly & Sons Ltd. and Others and McElduff and Others v. United Kingdom*, Eur. Ct. H.R., App. No. 62/1997/846/1052-1053 (10 Jul. 1998), at para. 78 (stating that, "[t]he Court notes that in other contexts it has been found possible to modify judicial procedures in such a way as to safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of procedural justice ...The introduction of a procedure, regardless of the framework used, which would allow an adjudicator or tribunal fully satisfying the Article 6 § 1 requirements of independence and impartiality to examine in complete cognisance of all relevant evidence, documentary or other, the merits of the submissions of both sides, may indeed serve to enhance public confidence").

[i]n the framework of a criminal proceeding, especially when it involves the investigation and prosecution of illegal actions attributable to the security forces of the State, there is a possible conflict of interests between the need to protect official secret, on the one hand, and the obligations of the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other hand.

[...P]ublic authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the “clandestinity of the Executive branch” and to perpetuate impunity.

Likewise, when a punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act. “It is not, therefore, a matter of denying that the Government must continue to safeguard official secrets, but of stating that in such a paramount issue its actions must be subject to control by other branches of the State or by a body that ensures respect for the principle of the division of powers...” Thus, what is incompatible with the Rule of Law and effective judicial protection “is not that there are secrets, but rather that these secrets are outside legal control, that is to say, that the authority has areas in which it is not responsible because they are not juridically regulated and are therefore outside any control system...”¹⁴⁷

140. Accordingly, the assertion of national security or the invocation of the ‘state secrets’ privilege cannot automatically constitute a legitimate aim but must be analyzed in the context of each individual case.
141. In the present case, this requires more than simply asserting that ‘extraordinary rendition’ constitutes a ‘state secret’; each case must be determined on its facts and the precise aspects of ‘extraordinary rendition’ which have national security implications must be identified. Given persistent concerns about the overclassification of information by the US executive more widely,¹⁴⁸ there is clearly the potential for the ‘state secrets’ privilege to be abused, thereby demanding greater judicial scrutiny of the executive’s assertion that certain information or activity is privileged. Much greater scrutiny is therefore required than that carried out by the US courts in dismissing the present petition on the basis that:

¹⁴⁷ *Myrna Mack-Chang v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 101 (25 Nov. 2003) at paras. 180-181 (reaffirmed in *La Cantuta v. Peru*, Inter-Am Ct. H.R. Series C No. 162 (29 Nov. 2006) at para. 111).

¹⁴⁸ Robert M. Pallitto and William G. Weaver, “Presidential Secrecy and the Law” (Published by JHU Press, 2007) noting at 46 that, “[m]ost observers acknowledge that overclassification is a significant problem, and this has led to some embarrassing moments for the executive branch”).

...the facts central to its resolution would be the roles, if any, that the defendants played in the events he alleges. To establish a prima facie case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations.¹⁴⁹

142. In the present case, the subject matter of the petition – ‘extraordinary rendition’ – formed the basis for the Court’s dismissal of the claim, without any assessment of which aspects of ‘extraordinary rendition’ constitute a ‘state secret’. No consideration was given to how the Court might recognize Mr. El-Masri’s fundamental right to a remedy while at the same time protecting the national security interests at stake. Instead, in the present petition, the right to a remedy was extinguished altogether.

c) Any Restriction on the Right to a Remedy must be Proportionate and the Least Restrictive as Possible

143. Even where national security interests are considered legitimate, they cannot extinguish the right to a remedy altogether but must be proportionate and strictly necessary to achieve that aim in a democratic society, and must impact the right in the least restrictive way. The burden of proof lies on the state asserting the national security interests to demonstrate the proportionality of the restriction.
144. Once the courts have identified which particular aspects of ‘extraordinary rendition’ have national security implications, each piece of evidence must be assessed with a view to ensuring that any restriction on the right to a remedy is as narrowly interpreted and the least restrictive as possible.
145. As the Inter-American Court set out in an Advisory Opinion in relation to freedom of expression:

[i]t is important to note that the European Court of Human Rights, in interpreting Article 10 of the European Convention, concluded that "necessary," while not synonymous with "indispensable," implied "the existence of a 'pressing social need'" and that for a restriction to be "necessary" it is not enough to show that it is "useful," "reasonable" or "desirable." (Eur. Court H. R., *The Sunday Times Case*, judgment of 26 April 1979, Series A no. 30, para. 59, pp. 35-36.) This conclusion, which is equally applicable to the American Convention, suggests that the "necessity" and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if

¹⁴⁹ *El-Masri v. Tenet*, *supra* note 8 at para. 36.

there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. (The Sunday Times Case, *supra*, para. 62, p. 38. See also Eur. Court H. R., Barthold judgment of 25 March 1985, Series A no. 90, para. 59, p. 26.)¹⁵⁰

146. In making such an assessment, courts must consider alternative ways of considering the evidence in order to protect the national security interests at stake while upholding the right of the individual to a remedy. In this respect, permissible restrictions on the right to a remedy may include hearing the evidence or trial (or portions thereof) which raise national security concerns *in camera*.
147. For example, and as will be discussed further below, the European Court has considered the adequacy of using security-cleared advocates in the UK to protect the national security interests at stake while upholding Article 6(1) of the ECHR. While specific aspects of the mechanisms and procedures employed have to be tested for consistency in terms of the rights of the applicant, the European Court has fundamentally pointed out that alternative ways of receiving and hearing privileged information must be explored and used where available.¹⁵¹ Thus, in cases which raise national security concerns, courts should identify ways in which to protect potentially sensitive pieces of evidence while at the same time ensuring that the “essence” of the right to an effective remedy is not undermined or removed.
148. For example, in *Chahal v. the United Kingdom*, the European Court held that:

¹⁵⁰ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*, Advisory Opinion OC-5/85, Inter-Am. Ct. H.R., (Ser. A) No. 5 (1985) (13 Nov. 1985) at para. 46. See also, *Alba Pietrarola v. Uruguay*, *supra* note 139 at para. 16 (finding that: “[t]he Human Rights Committee is aware that the sanction of deprivation of certain political rights is provided for in the legislation of some countries. Accordingly, article 25 of the Covenant prohibits “unreasonable” restrictions. In no case, however, may a person be subjected to such sanctions solely because of his or her political opinion (arts. 2 (1) and 26). Furthermore, the principle of proportionality would require that a measure as harsh as the deprivation of all political rights for a period of 15 years be specifically justified. No such attempt has been made in the present case”). See also, *R v. Oakes*, Supreme Court of Canada, [1986] 1 SCR 103 at para. 80.

¹⁵¹ See, for example, *Tinnelly & Sons Ltd. v. United Kingdom*, *supra* note 146 at para. 78. See also, *Devenney v. United Kingdom*, Eur. Ct. H.R. App. No. 24265/94 (19 Mar. 2002) at paras. 23- 29; *Al-Nashif v. Bulgaria*, Eur. Ct. H.R., App. No. 50963/99 (20 Jun. 2002) at paras. 93-98; and *Prosecutor v. Blaskic*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Appeals Chamber Judgment of 29 Oct. 1997) at paras. 65-69.

[t]he Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved ... there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence and yet accord the individual a substantial measure of procedural justice.¹⁵²

...Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an *in camera* hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of the security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examine the witnesses and generally assists the court to test the strength of the State's case.¹⁵³

149. In *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, the European Court considered a case in which access to justice had been restricted on national security grounds. It found that:

[t]he Court notes that in other contexts it has been found possible to modify judicial procedures in such a way as to safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of procedural justice (see paragraphs 49, 51 and 52 above). It is not persuaded by the Government's claim that the adjustment of procedures under the fair employment legislation or the introduction of other special judicial procedures to accommodate both of these interests need in any way undermine the independence of the judiciary in Northern Ireland or impair public confidence in the administration of justice in the province (see paragraph 68 above). The introduction of a procedure, regardless of the framework used, which would allow an adjudicator or tribunal fully satisfying the Article 6 § 1 requirements of independence and impartiality to examine in complete cognisance of all relevant evidence, documentary or other, the merits of the submissions of both sides, may indeed serve to enhance public confidence.¹⁵⁴

150. In *Tinnelly*, the European Court considered the use of Special Advocates in the UK as adequate to protect the national security interests at stake, while at the same time upholding Article 6(1) of the ECHR. Special Advocates act on behalf

¹⁵² *Chahal v. United Kingdom*, *supra* note 102 at para. 131.

¹⁵³ *Chahal v. United Kingdom*, *supra* note 102 at para. 144.

¹⁵⁴ *Tinnelly & Sons Ltd v. United Kingdom*, *supra* note 146 at para. 78.

of defendants who are alleged to have been involved in terrorist activities and are given security clearance to view intelligence and privileged information, but are not allowed to disclose this information to the defendant, or to his or her lawyer.

151. While aspects of the Special Advocates system have been criticized as regards the rights of the defendant,¹⁵⁵ the fundamental point made by the European Court in *Chahal* and *Tinnelly* is that alternative ways in which to receive and hear privileged information must be explored and used where available. This was set out by the European Court in *Al-Nashif v. Bulgaria*:

[w]ithout expressing in the present context an opinion on the conformity of the above [Special Advocates] system with the Convention, the Court notes that, as in the case of *Chahal* cited above, there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.¹⁵⁶

d) *The Restriction Must not Entirely Extinguish the Right to a Remedy*

152. Where the right to a remedy is extinguished altogether, this will be considered disproportionate.¹⁵⁷ In *Cordova v. Italy (No. 1)*, in which a public prosecutor had been prevented from bringing an action for defamation as a result of a parliamentary immunity, the European Court held that any limitations on access to justice under Article 6 of the ECHR “must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired”.¹⁵⁸
153. Any proposed restrictions on the right to a remedy thus require rigorous scrutiny and the burden lies with the party seeking to achieve the restriction to demonstrate why the proposed restrictions pursue a legitimate aim, are proportionate and the least restrictive as possible, are strictly necessary in a democratic society, and do not remove or undermine the “essence” of the right to an effective remedy.
154. The jurisprudence of the Inter-American Commission and Court has consistently and clearly stressed that procedural rules cannot be used to create a blanket ban on the exercise of the right to an effective remedy in the courts of the state allegedly responsible for the violation, as this would undermine the victim’s right to a

¹⁵⁵ See House of Commons Constitutional Affairs Committee, “The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates”, Seventh Report of Session 2004-2005 Volume 1 (22 Mar. 2005) at paras. 44-66.

¹⁵⁶ *Al-Nashif v. Bulgaria*, *supra* note 151 at para. 97.

¹⁵⁷ *Cordova v. Italy (No. 1)*, *supra* note 132 at paras. 65-66 (in respect of Article 6). See also, *Waite and Kennedy v. Germany*, *supra* note 138 at paras. 59 and 73.

¹⁵⁸ *Cordova v. Italy (No. 1)*, *supra* note 132 at para. 54.

remedy and reparation, and society's right to the truth, and would contribute to a culture of impunity.¹⁵⁹

155. For this reason, the Inter-American Commission and Court have been consistently clear on the invalidity of amnesties for crimes under international law, such as those alleged in the present case.
156. In 1992, for example, the Inter-American Commission heard three cases on the amnesties in Argentina, El Salvador and Uruguay. The amnesties differed in nature, from the El Salvadorian blanket amnesty (which prohibited any investigations, prosecutions or compensation) to the Argentinean amnesty (which sat alongside a handful of prosecutions and a truth commission). Yet, in each case, the Inter-American Commission found that the amnesty violated,

the state obligation -- part of its duty to "ensure" human rights under article 1(1) -- to investigate violations. Second, at least in states that permit victims to participate in criminal proceedings, the amnesties violated the state duty under article 8(1) to afford victims a fair trial. Third, the amnesties violated rights of victims and survivors to adequate compensation, required both by article 1(1) and by the right to judicial protection under article 25.¹⁶⁰

157. In the *Barrios Altos* case, the Inter-American Court held:

[t]his Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.¹⁶¹

Like the Commission, the Court grounded its reasoning in the rights of victims, noting that,

[s]elf-amnesty laws lead to the defenselessness of victims and perpetuate impunity ... This type of law precludes the identification of the individuals who are responsible for human rights violations, because it

¹⁵⁹ See e.g., *Chumbipuma Aguirre v. Peru (Barrios Altos Case)*, Inter-Am. Ct. H.R., (Ser. C) No. 75 (14 Mar. 2001), at para. 41. See also, HRC General Comment No. 20, *supra* note 95 at para. 15; *Rodríguez v. Uruguay*, HRC, U.N. Doc. No. CCPR/C/51/D/322/1988 (1994), at paras. 12.1-12.4;

¹⁶⁰ Douglass Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities", 59 *Law & Contemp. Prob.* Vol. 59: No. 4 (Autumn 1996) 197 at 212 (discussing *Las Hojas v. El Salvador*, Inter-Am. Comm. H.R., Case No. 10.287 Report No. 26/92, (24 Sept.1992); *Herrera v. Argentina*, Inter-Am. Comm. H.R., Case No. 10.147 Report No. 28/92, (2 Oct. 1992); and *Leonardo v. Uruguay*, Inter-Am. Comm. H.R., Case. No. 10.029 Report No. No. 29/92, (2 Oct.1992)).

¹⁶¹ *Chumbipuma Aguirre et al. v. Peru (Barrios Altos Case)*, *supra* note 159 at para. 41.

obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.¹⁶²

158. In *Caracazo v. Venezuela*, the Inter-American Court held that:

[t]he State must ensure that domestic proceedings directed toward investigation and punishment of those responsible for the facts in this case have the desired effects and, specifically, not resort to measures such as amnesty, extinguishment and measures designed to eliminate responsibility. In this regard, the Court has pointed out that:

[...] all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.¹⁶³

159. The UN Human Rights Committee has similarly found that,

[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.¹⁶⁴

160. The language used by both the Inter-American Commission and Court demonstrates that their reasoning is not exclusive or limited to amnesties, but rather extends to any national rule which operates to remove the rights accorded to victims under the American Convention and Declaration.

3) **The Failure to Judicially Scrutinize the Practice of ‘Extraordinary Rendition’ Sustains Impunity and Creates a Climate in which the Practice Can Continue**

161. The UN Impunity Principles define impunity as:

“[i]mpunity” means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil,

¹⁶² *Chumbipuma Aguirre et al. v. Peru (Barrios Altos Case)*, *supra* note 159 at para. 43.

¹⁶³ *Caracazo v. Venezuela*, Inter-Am Ct. H.R., (Ser. C) No. 95 (29 Aug. 2002) at para. 119.

¹⁶⁴ HRC *General Comment* No. 20, *supra* note 95 at para. 15. The Committee later reaffirmed this position in the individual communication of *Rodríguez v. Uruguay*, *supra* note 159 at paras. 12.1-12.4.

administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.¹⁶⁵

162. The failure to enable individuals who allege that they have been subject to the practice of ‘extraordinary rendition’ to access the US courts in order to bring a civil claim for compensation contributes to impunity for ‘extraordinary rendition’.
163. As set out above, regional and international courts and tribunals as well as experts in the field have repeatedly held that “national security” considerations cannot provide an exception to nor permit derogation from the absolute prohibition of torture, of which the absolute principle of *non-refoulement* forms an integral part.¹⁶⁶ Nevertheless, the practice of ‘extraordinary rendition’ has created a class of individuals, qualified as “terror suspects”, who do not have access to a remedy while detained, and who are further denied access to a court if and when they are released. This, in fact, enables the use of torture and other cruel, inhuman or degrading treatment or punishment, and enforced disappearances to continue with impunity.
164. As such, the upholding of the right to a remedy while accommodating national security concerns not only protects the immediate rights of the individual applicant but also contributes towards preventing and combating the practice of ‘extraordinary rendition’ altogether.¹⁶⁷
165. Furthermore, the UN Basic Principles on a Right to a Remedy and Reparation specifically underscore their “victim-oriented” nature, stating in the Preamble that “the international community affirms its human solidarity with victims of violations of international law”.¹⁶⁸ This underscores that the right to a remedy, including access to a court, is not only a means by which to seek reparation but that the process itself can be an important component of reparation.
166. As the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has previously noted, “reparation, beyond the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts, has an

¹⁶⁵ U.N. Impunity Principles, *supra* note 130, at 6 (Definitions).

¹⁶⁶ See Comm. Against Torture General Comment No. 2, *supra* note 126, at paras. 5-6; *Saadi v. Italy*, *supra* note 104, at paras. 138 and 141; IACHR, “Report on Terrorism and Human Rights”, *supra* note 91 at para. 216; and *Chahal v. United Kingdom*, *supra* note 102 at para. 79.

¹⁶⁷ See B. Henderson, “From Justice to Torture: The Dramatic Evolution of U.S.-Sponsored Renditions” 20 Temp. Int’l & Comp L.J. 189 (2006) at 216.

¹⁶⁸ Preamble, U.N. Basic Principles on a Right to a Remedy and Reparation.

inherent preventative and deterrent aspect”,¹⁶⁹ thereby directly connecting access to a court to the combating of torture and by extension ‘extraordinary rendition’.

167. The Inter-American Court in *Juan Humberto Sanchez v. Honduras* held that impunity, the failure to investigate and punish guilty parties, “fosters chronic recidivism of human right violations, and total defenselessness of victims and their relatives”.¹⁷⁰ In *Bámaca Velásquez*, in his Separate Opinion, Judge A.A. Cançado Trindade stated that

[t]he right to truth indeed requires the investigation by the State of the wrongful facts, and its prevalence constitutes, moreover, as already observed, the prerequisite for the effective *access* itself to justice - at national and international levels - on the part of the relatives of the disappeared person (judicial guarantees and protection under Articles 8 and 25 of the American Convention). As the State is under the duty to cease the violations of human rights, the prevalence of the right to truth is essential to the struggle against impunity, and is ineluctably linked to the very *realization* of justice, and to the guarantee of non-repetition of those violations.¹⁷¹

168. In relation to ‘extraordinary rendition’ specifically, one commentator notes that, “[h]olding U.S. officials civilly liable would unquestionably impact the Executive’s conduct of foreign policy by making the cost of rendition to torture prohibitively high”.¹⁷²

CONCLUSION

169. We respectfully submit therefore that the Inter-American Commission should:

- Join its consideration of the admissibility and merits of the case;¹⁷³
- Request the “promptest reply” from the US;¹⁷⁴

¹⁶⁹General Assembly, “interim report on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights,” U.N. Doc. No. A/55/290 (11 Aug. 2000) at para. 28.

¹⁷⁰ *Juan Humberto Sánchez v. Honduras*, Inter-Am. Ct. H.R., Series C No. 99 (7 Jun. 2003) at para. 143 (citing *Case of the “White Van” (Paniagua-Morales et al.) v. Guatemala*, Inter-Am. Ct. H.R., Series C No. 37 (8 Mar. 1998) at para. 173.

¹⁷¹ Separate Opinion of Judge A.A. Cançado Trindade, *Bámaca Velásquez v. Guatemala*, Int-Am. Ct. H.R., Series C No. 70 (25 Nov. 2000) at para. 32.

¹⁷² B. Henderson, *supra* note 167 at 216.

¹⁷³ Article 37(3) Rules Of Procedure of the Inter-American Commission on Human Rights: “[i]n exceptional circumstances, and after having requested information from the parties in keeping with the provisions of Article 30 of these Rules of Procedure, the Commission may open a case but defer its treatment of admissibility until the debate and decision on the merits. The case shall be opened by means of a written communication to both parties”.

¹⁷⁴ Article 30(4) Inter-Am. Comm. H.R. Rules of Procedure: “[i]n serious and urgent cases, or when it is believed that the life or personal integrity of a person is in real and imminent danger, the Commission shall request the promptest reply from the State, using for this purpose the means it considers most expeditious”.

- Require that the US present “its response and observations on the admissibility and the merits of the matter” together;¹⁷⁵
- Make a declaration and detailed assessment of the incompatibility of all aspects of the ‘extraordinary rendition’ program with the rights set out in the American Declaration and Convention, and international law generally; and
- Find that the application of the ‘state secrets’ privilege by US courts to entirely extinguish the right of access to a court is incompatible with the fundamental right to a remedy; and to recommend to the US how national security interests might be accommodated while upholding the right to a remedy.

¹⁷⁵ Article 30 (7) Inter-Am. Comm. H.R. Rules of Procedure: “[i]n the cases envisioned in subparagraph 4, the Commission may request that the State presents its response and observations on the admissibility and the merits of the matter. The response and observations of the State shall be submitted within a reasonable period, to be determined by the Commission in accordance with the circumstances of each case”.